# EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondent** |
|---|---|---|
| **Ms Andrea Bonnett** | **v** | **London Borough of Camden** |

**Heard at**: London Central
**On**: 11 and 12 July 2023 and
13 and 14 July 2023 in chambers

**Before:** Employment Judge Hodgson

**Representation**

**For the claimant:** Mrs M Sewell, lay representative
**For the respondent:** Ms S Chan, counsel

## JUDGMENT

The claim of unfair dismissal is not well founded and is dismissed.

## REASONS

**Introduction**

1.1 By a claim form dated 30 July 202, the claimant alleged she had been constructively dismissed. She brought a claim of unfair dismissal only.

**The Issues**

2.1 The issues were considered on 2 February 2023 by EJ McCarthy. The issues identified were to be treated as final, unless either party objected, or the tribunal decided otherwise.

2.2 EJ McCarthy set out the issues as follows:

**Was the claimant dismissed?**

1. **Did the respondent do the following things:**
    a. **Single out the claimant between 4 March 2021 and January 2022 in relation to the duties she wasassigned. The claimant relies on the original email sent by Asha Ramrajsingh on 4 March 2021 assigning the claimant her duties;**
    b. **At a meeting between management and the claimant on 26 April 2021, at which she discussed her workload, well being and anxiety, the respondent showed a lack of concern for her wellbeing, intimidated the claimant, did not take her issues seriously, insinuated the laimant was lazy and not a team player and, after the meeting, did not follow up on the concerns that she had raised.**
    c. **Created an intimidating environment for the claimant from 26 April 2021 to January 2022 after the claimant met with management to discuss her workload, wellbeing and anxiety.**
    d. **Harassed the claimant between 6 July 2021 and January 2022 by making repeated references to certain duties only being within the claimant's job profile and this was why she was required to undertake such duties.**
    e. **Racially harassed the claimant at a meeting on 1 November 2021. The claimant says that she was told by Ms Ramrajsingh that she was "loud, aggressive and rude."**
    f. **Showed a lack of duty of care for the claimant in relation to her suffering stress and anxiety at work between 26 April 2021 to April 2022. Failed to use its own policies to resolve the issues regarding the claimant's workload inhouse and, as a result, left the claimant with not alternative but to involve her union representative to try and resolve issues.**
    g. **Failed to resolve the claimant's concerns with her workload in timely manner – Claimant's emails were ignored, meetings postponed, resolution delayed whilst claimant's workload was constantly increasing, no discussions were taking place to resolve it and claimant was not told that she could return to her original workload.**
    h. **The respondent breached its own policies and codes of conduct (paragraph 3,1, 4,1, 4.3 and 4.4) in relation to its treatment of the claimant between 6 July 2021 and April 2022. 1.1.1.9 The respondent showed a lack of concern for the claimant's mental health and wellbeing between 15 September 2021 – April 2022. 1.1.1.10 The respondent "deleted" the claimant's role in January 2022 during a restructuring of her department. The claimant says she was notified of the deletion of her role by the respondent on 11 January 2022.**
    i. **The respondent did not provide the claimant with any opportunities for re-deployment within her team. 1.1.1.12 The restructuring that led to claimant's role being deleted was undertaken to intimate and harass the claimant so her only option was to resign.**
    j. **The respondent failed to comply with its policy in relation to redundancies/ restructuring – in that it did not do all it could to keep the claimant in employment and did not provide the laimant with any advice, encouragement as to what she should do regarding redeployment and/or indicate that there was an alternative role for her. She was told by management that there was no scope for redeployment.**
2. **The claimant identifies the "last straw", which made her apply for voluntary redundancy on 21 January 2022, as being notified that her role had been deleted and being told that there was no scope regarding redeployment (and receiving no encouragement or indication that there may be an alternative role) on 13 January 2022.**

3. **Did that breach the implied term of trust and confidence? The Tribunal will need to decide:**
    a. **whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and**
    b. **whether it had reasonable and proper cause for doing so.**
4. **Was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.**
5. **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.**
6. **Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.**
7. **If the claimant was dismissed, what was the reason or principal reason for dismissal i.e. what was the reason for the breach of contract?**
8. **Was it a potentially fair reason?**
9. **Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?**

2.3 It is unclear to me how these issues were formulated. Several matters identified are not clearly set out in the claim form. It would appear that the record reflects the documents considered and the representations made at the preliminaty hearing, as interpreted by the judge.

2.4 The claim form records the date of termination as 12 April 2022. Paragraph 4 of the response is silent on the point.

2.5 The issues failed to record what was said to be the resignation, or when it took effect.

2.6 The response states the claimant "requested voluntary redundancy on 21 January 2022" which was accepted on 1 February 2022 and the final day of employment was 12 April 2022 "following the completion of the notice period." The response does not clearly identify what is claimed to be the resignation.

2.7 The particulars of claim fail to identify what is said to be the resignation, or when it occurred.

2.8 During the course of the claimant's evidence, I noted that what was said to be the resignation appeared to be unclear. I brought this to the parties' attention and noted that it appeared there may have been an express dismissal. This matter was also discussed during the second day. Ultimately, both parties sought to amend their pleadings. I will record the applications below.

2.9 Following the application to amend the issues were amended. This was the final position.

2.10 It is the claimant's case that she was constructively dismissed following resignation by emails of 11 March 2022 and 18 March 2022. In the

alternative, she alleges the respondent's letter of 14 February 2022, which gave notice of termination, was an express dismissal. She denies that the expression of interest sent on 21 January 2022 was a resignation.

2.11 It is the respondent's case that the claimant resigned by providing an expression of interest on 21 January 2022, as accepted on 31 January 2022. In the alternative, it is the respondent's position that the contract came to an end by mutual consent. The respondent alleges it made an offer, being the expression of interest on 21 January 2022, which was accepted on 31 January 2022. The respondent denies that the letter of 14 February 2022 amounted to an express dismissal. The respondent's pleaded case, that the termination took effect on 12 April 2022, was not amended.

2.12 If it is found there was a dismissal, it is the claimant's case it was unfair. The respondent alleges any dismissal was fair by reason of redundancy.

## Evidence

3.1 For the claimant, I heared from claimant, Mr Brendan Power and Mr Andy Kemp.

3.2 For the respondent I heard from Mrs Asha Ramrajsingh, Mr Sam Pandya, and Mr Ronnie Celaire.

3.3 I received a joint bundle of documents.

3.4 The parties filed chronologies.

3.5 I received a cast list from the respondent.

3.6 Various documents were introduced during the course of the hearing, including a video.

3.7 Both parties gave oral and written submissions.

## Concessions/Applications

4.1 I should deal first with the applications to amend.

4.2 Initially the respondent sought "clarification" of the case it was to face, but asserted that no amendment was required to the response, it being the respondent's position that the employment come to an end by mutual consent and in the alternative that there had been resignation by the claimant. The respondent alleged that both matters were adequately pleaded and required no amendment.

4.3 The claimant denied that the expression of interest in voluntary redundancy of the 21 January 2022 was a resignation. She stated she relied on emails of 11 and 18 March 2022 as being either each, or jointly,

the resignation. The respondent did not require the claimant to amend in relation to this, albeit there was no reference to the emails of 11 and 18 March in her claim form.

4.4 The claimant elected to seek amendment to allege that, in the alternative to constructive dismissal, she was dismissed by the respondent expressly by letter dated 14 February 2022.

4.5 The respondent objected to that amendment. I allowed the amendment and reserved the reasons. I set out the reasons now.

4.6 The relevant legal principles to be applied, when considering amendment, can be stated briefly. The leading authority **is Selkent Bus Company Limited v Moore** 1996 ICR 836.

4.7 The tribunal must carry out a careful balancing exercise of all the relevant circumstances. It must balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

4.8 When considering the balance of injustice and hardship, **Selkent** states that all the relevant circumstances must be taken into account, and those circumstances include the following: the nature of the amendment (is it minor or substantial); the applicability of time limits; and the timing and manner of the application.

4.9 **Selkent** states minor amendments include the following: the correction of clerical errors; the addition of incidental factual details to support existing allegations; and the relabeling of existing factual allegations as a different cause of action. Substantial amendments may include pleading new factual allegations, whether as a fresh cause of action or new allegations for an existing cause of action.

4.10 The respondent alleged that the amendment introduced a new cause of action which was not expressly pleaded, albeit the respondent conceded that the issue of time was not engaged. The respondent alleged that allowing the amendments would cause prejudice, as the nature of the evidence to be produced would change, in particular that it would be necessary to engage with general principles of fairness in redundancy situations and call evidence concerning the approach to redundancy, including consultation and selection.

4.11 The claimant did not make any specific submissions.

4.12 I find this amendment does not introduce a new cause of action. There is a single cause of action – unfair dismissal. In all claims of unfair dismissal there is question as to whether the claimant was dismissed. Dismissal is defined by section 95 Employment Rights Act 1996. If dismissal is shown, there is a simple consideration under section 98(4) to determine fairness. In determining the fairness, neither side has the burden.

4.13 It follows that when there is a claim of unfair dismissal the first question will always be - is there a dismissal. The claimant has put her case on the basis of constructive dismissal. The claimant failed to identify with precision the resignation. The respondent has assumed the resignation occurred on 21 January, being the expression of interest. At all times the respondent knew that it gave notice on 14 February 2022, as confirmed by the response.

4.14 The application proceeded on the assertion that the response set out, in the alternative, that the termination was by mutual consent. I am not satisfied that an allegation of dismissal by mutual consent is contained within the response and the assertions appears to be an afterthought. It is not expressly dealt with in the response or any of the statements. It appears to me that in preparing this case the respondent has failed to give any or any adequate consideration to whether there was a resignation, and if there was no resignation, what was the effect of giving notice.

4.15 Whatever the position, there was always a possibility that the claimant would establish that she had resigned, and that the resignation amounted to an constructive dismissal. In those circumstances, the question of fairness was always engaged. The respondent was on notice to produce the relevant evidence which would concern the restructuring, any consultation, and the interaction of the claimant with the process. In this case, an analysis of the redundancy situation and process was particularly important given the claimant's underlying allegation that the procedure had been manipulated in order to single her out for reasons unconnected with redundancy. I reject the respondent's submission that it was not on notice to produce the relevant evidence on the fairness of the process.

4.16 The amendment merely alters the basis on which an existing claim is brought by alleging that the circumstances may amount to an express dismissal. Any failure of the respondent to identify the relevant evidence which would underpin an assertion that the dismissal was fair has been caused by the respondent's own approach, and by its own litigation choice taken in the full knowledge that the evidence was potentially relevant. That is not a sufficient reason to lead to postponement of this hearing or to allow further evidence.

4.17 In my view the amendment is limited. It is a different interpretation of the existing facts in the context of the same cause of action. The balance of hardship is clearly in favour of allowing it.

4.18 I allowed the following amendment:

> **The claimant, in the alternative to alleging she was constructively dismissed, may rely on an allegation that she was expressly dismissed by letter of 14 February 2022, which gave notice terminating on 12 April 2022.**

4.19 The claimant clarified that the resignation for the purposes of constructive dismissal occurred by the emails of 11 and 18 March 2022.

4.20 At the start of discussion, we agreed that the tribunal would, on the invitation of the respondent, interpret paragraphs 1, 33, and 38 of the grounds of resistance as being an allegation by the respondent that there was no dismissal for two reasons: first, there was a resignation but it was not a constructive dismissal; second there was no resignation but termination of the contract was by mutual consent on 12 April 2022.

4.21 Following this discussion, and the claimant's application to amend, the respondent sought to amend. The amendment was not objected to, and I saw no prejudice to the claimant in allowing it. The amendment allowed is as follows:

> **The mutual termination was by way of offer and acceptance with the offer being 21 January 2022 (page 555) the expression of interest, which was accepted on 31 January 2022 (page 565).**

## The Facts

5.1 In setting out these facts, and in reaching my conclusions, I should note that I have had regard to the entirety of the evidence and submissions before me. I received extensive evidence about the following: the working relationship, particularly the tasks assigned to the claimant; her view as to how reasonable they were; the complaints made; the discussions undertaken; the adjustments; and the resolution. It is unnecessary for me to record all of the relevant evidence, but I confirm that I have had regard to the totality. It is sufficient to give an outline of the background disputes which occurred in the period leading up to the redundancy process.

5.2 On 2 January 2014, the respondent employed the claimant as an accessible transport officer. This was, essentially, a clerical position in the respondent's "Camden accessible travel solutions department" which has been referred to throughout as "CATS".

5.3 CATS provides accessible transport solutions for older people or anyone with a disability who has travel needs. The claimant's role involved management of a 'ScootAbility' scheme. In 2017 the claimant was given some responsibility for financial transactions.

5.4 At the material time, the department had provision for two accessible transport officers. Albeit one position was not filled. In addition, there were more senior posts. The duties were not the same. The senior posts had greater responsibility for processing various applications.

5.5 The department had an email for enquiries and complaints which has been referred to as the "inbox." The management of that inbox varied over time. When responsible for the inbox, it was necessary to consider the emails. There was a triage function, whereby some emails would be forwarded to relevant members of staff. Others would be dealt with by the person dealing with the inbox.

5.6 Management of the inbox had been shared by the team but a decision was made, initially on a temporary basis, that the claimant should take responsibility for the inbox daily. The claimant found this unwelcome. I have not accepted her evidence that management of the inbox was a full-time job. Allocating the inbox to her was within her job description. It was a managerial decision within the discretion of the respondent's managers.

5.7 The claimant was initially given temporary responsibility for daily management of the inbox by Mrs Asha Ramrajsingh on 26 February 2021. The claimant accepts that this was a legitimate management instruction and considers it reasonable to have been asked to do it for a limited period.

5.8 On 4 March 2021, the claimant was advised that allocation of the inbox to her would be permanent. The claimant objected. She considered the management of the inbox to be onerous and unfair. She considered that the volume was too great. I do not need to record all details of the various meetings and complaints. It is apparent that the claimant continued to press for a change through various emails and various meetings.

5.9 There were a number of meetings, including 26 April 2021, 6 July 2021, and 26 September 2021, when the senior manager, Mr Sam Pandya was involved. Ultimately, by 4 November 2021, the respondent agreed, as approved by Mr Sam Pandya, that the claimant would have inbox duties for two days a week only and that Mrs Asha Ramrajsingh would assist. There was a further meeting on 23 November when further involvement of senior staff was considered. However, the claimant was no longer required to undertake inbox duties on her own, albeit Mr Sam Pandya remained of the view that her management of the inbox would be the most appropriate way of dealing with the work. Nevertheless, he continued the agreement that the claimant would do the inbox for two days a week initially on a trial basis.

5.10 The claimant had several periods of absence. She was absent with stress for a few days on 20 December 2021. She started one month’s absence on 4 January because of stress; she returned on 7 March 2023.

5.11 Mr Sam Pandya, in his role as head of transport and fleet services, had overall responsibility for a number of departments, including the claimant’s. At the time he joined, phase 1 of a restructure of the service was underway and was supported by a consultation report. Phase 1 was completed in early 2021. Phase 1 largely concerned management, and the claimant's role was not considered.

5.12 The second phase was split into two parts, but I do not need to record the detail. Phase 2 included the claimant’s department and her role. Mr Sam Pandya, along with others, was considering the structure and was looking at the roles, rather than the individuals within the roles. There were various iterations as the proposals developed.

5.13 A restructure consultation began. On 27 September 2021, prior to formal consultation, Mr Sam Pandya confirmed that he would engage with each member and he proposed a meeting. There was a meeting on 28 September 2021, leading to a document on 29 September 2021. In October 2021 there was a process of "job matching" this essentially identified any positions that remained and “matched” suitable existing staff who may take those positions. The claimant's role was to be deleted. There was no specific job match for her. Those who did not have a job match, and whose positions were deleted, would be able to apply for a new role at up to one grade higher, but when applying for new roles there would be restricted competition and a degree of ring fencing.

5.14 There was a presentation on 7 October 2021.

5.15 Mr Sam Pandya prepared a further report on 30 November 2021 which summarized the proposals concerning the staff structure. In the claimant's department, the two accessible transport officers roles were to be deleted, as was an occupational therapist role. This would leave for senior positions.

5.16 There has been dispute as to whether there were three or four senior positions remaining. I find the situation was fluid but was not material to her actions. During the hearing, there was some suggestion of a conscious manipulation and a false restriction of positions to discourage the claimant. I find there is no evidence of this. The number of vacancies was shared with the union and had there been any suggestion of manipulation, I find on the balance of probability, that the union would have questioned it. I find that there is no credible evidence that four senior positions were reduced to three to frustrate the claimant from applying for a more senior position, or that such alleged action had any influence on the claimant’s actions, including her decision not to apply for roles in her department.

5.17 The claimant's role, as an accessible transport officer, was to be deleted.

5.18 The claimant did not initially apply for voluntary redundancy. There has been some evidence to suggest that the claimant was not kept fully informed. The claimant was on sickness absence, and it may be that communications were delayed. However, there is no credible evidence that this was intentional. In any event, at all times she had the assistance of her union, and I am satisfied that she was fully aware of the relevant developments and her options.

5.19 On 18 January 2022, Mr Brendan Power, the claimant’s union representative, raised some questions and asked whether the claimant could still request voluntary redundancy. She was given permission.

5.20 On 21 January 2022, the claimant submitted an expression of interest for voluntary redundancy it stated the following.

> **I wish to express an interest in taking Voluntary Redundancy.**
>
> **I understand that this is an expression of interest only and that I may withdraw this request at any time and in so doing be included in the selection process for posts in the new structure. I also understand that there is no obligation on the Council to accept any request for voluntary redundancy at this stage.**

5.21 On 24 January 2022 Mr Dominic Morris shared with staff the questions and answers received following the consultation.

5.22 On 31 January 2022 Mr Sam Pandya confirmed the claimant's request for voluntary redundancy had been accepted; it states:

> **You recently requested voluntary redundancy and I am pleased to inform you that we have accepted your request and will be forwarding your request for 'formal' approval at a Corporate level. In the meantime, please find an estimate of your potential redundancy payment below:**

5.23 The redundancy payment was £4,673.92 with an additional discretionary payment of £1,869.57.

5.24 On 3 February 2022, the final outcome report on phase 2a of the restructure was published. The report confirmed that staff feedback and trade union feedback were being considered. The concessionary service would have three senior officers carrying out roles which would include the claimant's duties.

5.25 Formal notice of redundancy was given on 14 February 2022 expiring on 12 April 2022.

> **Formal Notice of Redundancy**
>
> **I am writing to confirm that following the reorganisation of Camden Accessible Travel Solutions your substantive position has been deleted and that you will be excluded from the selection process for posts in the new structure and I am therefore issuing you with formal notice that your employment will be terminated by reason of redundancy.**
>
> **Notice Period: You are entitled to 8 weeks notice based on your having completed 8 years service with Camden. Your notice period will commence on 15 February 2022 and your last day of service will therefore be the 12 April 2022. As discussed, your last working day may be different to your last day of service if any annual leave to which you are entitled is taken in the time up until your last day of employment.**
>
> **Annual Leave: You have been advised that you must use all of your outstanding pro rated annual leave during your notice period. Your last working day will be confirmed by your manager, with any outstanding annual leave being taken before your last day of service. You will also agree with your manager the arrangements for concluding any key projects and handover of work.**
>
> **Redundancy and Discretionary Payments: The redundancy payment will be paid on the next pay day after the employees last day of service. Full details of redundancy payments can be found at Appendix 1 …**

**In accordance with council arrangements, you are entitled to receive an ex gratia payment (discretionary payment) in addition to the redundancy payment. This discretionary payment is calculated as an additional 40 % of your redundancy payment. Receipt of this payment will only be made if a signed Settlement Agreement is in place and the stipulated contractual obligations have been met.**

**Details of both the redundancy and discretionary payment are provided below and are also provided in the redundancy calculator attached.**
**...**
**Please note that redundancy and discretionary payments under £30k in total are not taxable.**

**Settlement Agreement and Contractual Obligations: Attached you will find a copy of your Settlement Agreement.**

**During your notice period you are required to continue to meet all contractual obligations to Camden, some of which include:**

- **Compliance with organisational policies and procedures e.g. Code of Conduct for Employees.**
- **Fulfilling requirements of the post – acknowledging that there may be a transition period.**
- **Reasonable attendance – acknowledging that the employee can be allowed reasonable time off to attend interviews.**
- **Leaving work in good order.**
- **A satisfactory handover.**

**If you fail to meet these contractual obligations, Camden has the right to withhold the ex gratia payment (discretionary payment) element.**

**You must seek independent legal representation on the Settlement Agreement and you need to get an Employment Lawyer / Solicitor to sign it. Please let us know who your chosen Solicitor is, so that we can arrange for their details to be added onto our approved suppliers list. Camden will pay up to £350 (excluding VAT) for the legal advice, but only on receipt of a signed settlement agreement. You are given 15 working days in which to seek legal representation, sign and return the Settlement Agreement. The date by which you need to return your Settlement Agreement is 7 March 2022.**

**By signing a Settlement Agreement, you are agreeing that you have no outstanding claim/s with Camden Council. The decision to sign a Settlement Agreement lies with you and you must seek legal advice on this. However, irrespective of whether you sign the Settlement Agreement or not, you are still entitled to your enhanced statutory redundancy payment (excluding the discretionary payment), provided you are not redeployed within your notice period.**

**Your redundancy payment will be paid on the next pay day after your last day of service. The ex gratia sum (discretionary payment) will be paid after your last day of service but, only on receipt of a signed settlement agreement. The aim is for this payment to be paid within 35 days of your last day of service.**

**Please note. Your final salary payment is based on actual days worked within your last month of service.**

**Redundancy Payments Modification Order: You will not be entitled to a redundancy payment if you enter further employment with an organisation**

**listed in the Redundancy Payments Modification Order 1983 within 4 weeks of leaving Camden, unless the job offer is made after your last day of service. A job offer can be either verbal or in writing. If you have been made an offer of employment before your redundancy date and you are unsure whether this will affect your severance package, please seek advice from the HR Change Management Team.**

**Camden's Two Year Rule: As an employee in receipt of a redundancy payment you will not normally be considered for further employment with Camden or for the hiring of your services in another capacity within 2 years of your last day of service.**

**Appeal: You have the right to appeal against the decision to dismiss you under this procedure if you can demonstrate that you meet the accepted grounds for appeal which can be found under Section 2.9 of the organisational Change Procedure document. The procedure and request for an appeal form can be found on Essentials.**

**I appreciate that reorganisations can be a difficult time for employees. Camden offers a counselling service that can help employees with short-term, confidential counselling. The service is confidential, free and available 24 hours a day, seven days a week. If you would like to talk to a trained counsellor, please contact the service on 0800 243 458. For further detail, please refer to Camden Essentials.**

**May I take this opportunity to personally thank you for your service in Camden and wish you well for the future.**

**If you have any questions about this letter or any of its contents, please do let me know.**

5.26 On 11 March 2022, the claimant sent the following email to Mr Sam Pandya.

**Following on from my return to work meeting on Tuesday 8th March.**

**After some review, I would like my last day of work to be Tuesday 22nd March 2022, rather than the 12th April as suggested. As I would prefer that I can say my goodbyes and return my keys, DWP token etc. I will contact IT in regards to my equipment. This would mean I do not have to return back at a later date, which was my original plan.**

**And in light of the exit interview, I am unsure as to how this would actually turn out because I have questions that would need addressing, on how I have been treated historically.**

**I would feel that a grievance would be more appropriate to address my questions, and I can finally have closure and move on.**

5.27 On 18 March 2022, the claimant sent a further email to Mr Sam

**Thank you for providing this document.**

**However, in regards to my leave day request this was put to you in an email request on the Friday 11th, when David was still in the workplace. As David is now on Annual leave that conversation can no longer take place because he does not return before my current last day Monday 21st.**

> **If you had advised me prior, I would have had the discussion with him to clarify.**
>
> **As he is not here the decision will lie with you as originally requested. Please refer to the earlier email from David, confirming that a good handover has taken place. Outstanding, request of the invoice which is in progress and should hopefully be completed by COP today and Scoot application process will be provided by Monday 21st.**
>
> **With that in the mind the 22nd March would be the day I would my last day to be.**
> **Thanks,**

5.28 On 11 April 2022, the last full day of employment, the claimant submitted a grievance. Her grievance was investigated. I do not need to record the detail of it.

5.29 A number of matters have been raised in support of the claimant's allegation that the respondent breached her contract. To the extent I need to consider those matters, I will find further facts when considering my conclusions.

## The law

6.1 Redundancy is defined in section 139(1) Employment Rights Act 1996:

> **(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to-**
>
> **(a) the fact that his employer has ceased or intends to cease–**
>
> **(i) to carry on the business for the purposes of which the employee was employed by him, or**
> **(ii) to carry on that business in the place where the employee was so employed, or**
>
> **(b) the fact that the requirements of that business –**
>
> **(i) for employees to carry out work of a particular kind, or**
> **(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer**
>
> **have ceased or diminished or are expected to cease or diminish**

6.2 In **Safeway Stores Plc v Burrell** [1997] ICR 523 the EAT set out a 3 stage test: (1) was the employee dismissed (2) if so, had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished or were they expected to cease or diminish (3) if so, was the dismissal of the employee caused wholly or mainly by the cessation or diminution?

6.3 There are no grounds for importing into the statutory wording a requirement that there must be a diminishing need for employees to do the kind of work for which the claimant was employed. The only question

to be asked when determining stage 2 of the new test is whether there was diminution in the employer's requirements for employees (rather than the individual claimant) to carry out work of a particular kind. It is irrelevant at this stage to consider the terms of the claimant's contract. The terms of the contract are only relevant at stage 3 when determining as a matter of causation whether the redundancy situation was the operative reason for the employee's dismissal. The test set out in **Burrell** was subsequently endorsed by the House of Lords in **Murray & Another v Foyle Meats Ltd** [1999] ICR 827. Lord Irvine LC (with whom Lords Jauncey, Slynn and Hoffmann agreed) said this -

> **My Lords, the language of paragraph (b) is in my view simplicity itself. It asks two questions of fact. The first is whether one or other of various states of economic affairs exists. In this case, the relevant one is whether the requirements of the business for employees to carry out work of a particular kind have diminished. The second question is whether the dismissal is attributable, wholly or mainly, to that state of affairs. In the present case, the tribunal found as a fact that the requirements of the business for employees to work in the slaughter hall had diminished. Secondly they found that that state of affairs had led to the appellants being dismissed. That, in my opinion, is the end of the matter.**

6.4 In considering the fairness of the dismissal the tribunal must apply section 98(4) Employment Rights Act 1996, applying that section I must consider the reasonableness of the employer's conduct not whether the tribunal considers the dismissal to be fair. In judging the reasonableness of the employer's conduct the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. There may be, although not in all cases, a band of reasonable responses where one employer might reasonably take one view and another quite reasonably take another view. The function of the tribunal as an industrial jury is to determine whether in a particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might adopt.

6.5 In considering whether there was termination by mutual consent I have regard to Birch and another v University of Liverpool [1985] IRLR 165. This case concerned applications for premature retirement. Lord Justice Slade stated,

> **The authorities, I think, require one to look at the realities of the facts, rather than the form of the relevant transactions, in deciding whether the contract has been 'terminated by the employer' within the meaning of the subsection. As Sir John Donaldson, MR put it in Martin v MBS Fastenings (Glynwed) Distribution [1983] IRLR 198:**
>
> > **'Whatever the respective actions of the employer and employee at the time when the contract of employment is terminated, at the end of the day the question always remains the same, "Who really terminated the contract of employment?"'**

6.6 He went onto say:

> **I would agree with the Industrial Tribunal that the fact that an employee may agree to his dismissal for redundancy does not necessarily prevent a dismissal taking place … in a case where there has in truth been a dismissal for redundancy… This is not, on its agreed facts, a case where the employees had been told that they were personally no longer required in their employment, or where they had been expressly invited or placed under pressure to resign…"**

6.7 He later said:

> **Two points, in my view, are of considerable importance... First, there was no evidence, or finding by the Tribunal, that the appellants were in any way led to believe that they would be compulsorily retired before normal retiring age, if they did not voluntarily apply for premature retirement under the Premature Retirement Compensation Scheme. Secondly, there is no finding that the University led the appellants to believe that they would be entitled to a redundancy payment if they applied for premature retirement under the Scheme.**

6.8 Voluntary redundancy may be classed as dismissal see for example **Burton, Allton & Johnson Ltd v Peck** [1975] IRLR 87. It is clear that each case must be considered on its own facts. It is necessary to consider whether the termination is fairly to be ascribed to a unilateral action of the employer. One must look to the substance not the form. If it is the employer's decision to dismiss, it matters not whether it is resented or welcomed. An employee who volunteers for redundancy, depending on the circumstances, may not be truly agreeing to terminate the contract, but may be indicating an agreement not to object to the unilateral dismissal.

6.9 The respondent has referred to a number of "illustrative" decisions particularly at paragraph 30 of the submissions; they each turn on their facts. I set out the principles above.

## Conclusions

7.1 It is common ground the claimant's contract came to an end. I need to consider whether that termination occurred because of resignation, mutual agreement, or express dismissal.

7.2 Was there a resignation? For there to be a resignation, there must be clear words of resignation, or if the words are unclear, all of the circumstances should be considered to see whether a resignation occurred, and if so when was the resignation given, and when did it take effect.

7.3 The respondent argues that the expression of interest amounted to a resignation. I find the expression of interest does not amount to resignation. It is neither an immediate resignation nor a giving of notice. It specifically states that the employee understood that it may be withdrawn in which case the selection process would proceed. This is inconsistent with resignation. The respondent had no obligation to accept it. Had the respondent not accepted it, it is clear that the employment would have continued.

7.4 A resignation is, essentially, a unilateral act. If contractual notice is given, it cannot be rejected. There may be an argument that resignation without notice may be a breach of contract, but that is not relevant on the facts in this case. There is no suggestion that the expression of interest was any form of breach which the respondent could choose not to accept; the expression of interest was expressly sought by the respondent, and the respondent was free to reject it and continue the employment.

7.5 I have considered the email of 11 March. This is not a resignation. This is a request to vary the final working day. It is everybody's case that the claimant's contract ended on 12 April, consistent with the notice given. In any event, Mr Sam Pandya evidence was to the effect that he did not accept any variation of the final date. On 17 March 2022, he emailed the claimant to confirm her last working day would be 12 April 2022.

7.6 The claimant's email of 18 March 2022 concerned her "leave day request." This is not a resignation. Whilst she requested the last working day to be 22 March, this is a request for some form of consensual variation; it was not consented to. It is not uncommon for an employee to seek discretion in relation to how holiday will be used during a notice period. Such routine discussions are very unlikely to be resignations. There is no suggestion of resignation in this case.

7.7 It follows that none of the documents relied on by the respondent and the claimant is a resignation.

7.8 For there to be a constructive unfair dismissal. The respondent must be in fundamental breach of contract, in this case breach of the term of mutual trust and confidence, at the of the resignation. The breach of contract must be a material reason for resignation. Even where there is a breach of contract, there can be no constructive dismissal, absent a resignation. Even where there is a breach of contract, no employee is obliged to resign. An employee may elect to treat the contract as continuing, even if the employee is contemplating resignation.

7.9 Any background dispute may be relevant in deciding whether there was a mutual termination or whether there was a dismissal. I will consider each of the matters which appear to be relied on as constituting the breach of contract. I will consider those matters identified at the previous case management hearing, albeit I have reservations as to whether they reflect the pleaded case or the case actively pursued.

7.10 I do not accept the claimant was singled out in a way which was inappropriate. The position she occupied was unique. The respondent was entitled to organise its work in a way which was appropriate and efficient. Undertaking inbox duties, and having sole responsibility to do so, was within the duties which could be assigned to the claimant. I do not accept that asking her to take sole responsibility for the inbox was outside her job description or was unreasonable. At the time, there were

pressures on the respondent and demands on the time of more senior workers. Undoubtedly, the claimant was unhappy, and she pursued her complaints. The fact that she was unhappy, and the fact that the respondent had numerous meetings with her and ultimately came to a compromise, tells me nothing about whether the respondent was in breach. At all times the respondent was entitled to ask the claimant to take sole responsibility for management of the inbox. It was not unreasonable for it to do so. It would not have been unreasonable to insist.

7.11 I was asked to consider the video of the meeting of 26 April 2021. I have done so. I find there is no basis for saying that the claimant was intimidated or the respondent showed a lack of concern. The respondent's approach to the meeting was reasonable.

7.12 I find that the respondent would have been entitled to insist on the claimant undertaking her duties and the fact that there were numerous meetings that, ultimately, led to a compromise reflects a positive attitude towards staff and demonstrates concern for her wellbeing. Whilst I accept the claimant found this difficult, I find the respondent's actions were reasonable and appropriate at all times.

7.13 I do not accept there is evidence that the respondent created an intimidating environment for the claimant from 26 April 2021 to January 2022.

7.14 The claimant alleges that she was racially harassed by Mrs Asha Ramrajsingh at a meeting on 1 November 2021 when she was referred to as being "loud, aggressive, and rude." The meeting occurred following an incident which occurred on or around 20 October 2021. Mrs Asha Ramrajsingh and others were involved in cleaning the office. Mrs Asha Ramrajsingh was unhappy with the conduct of the claimant who she described as having stood up forcefully saying "What the hell is going on in here today." She was offended by the comment and by the tone. She thought the claimant's action aggressive and aimed at her. It is the claimant's case that she neither used the words, nor was aggressive in tone, or inappropriate in her actions. It is her case that being accused on 1 November 2021 of being loud, aggressive, and rude was an act of racial discrimination, it being her case that the allegation was untrue, there being no factual basis for making it, and that it reflected a conscious use of a stereotype that black women are loud, rude, and aggressive.

7.15 There was no claim of race discrimination or harassment before me. I am satisfied on the balance of probability that the claimant did act negatively on 20 October, whether she intended to or not. I am satisfied that Mrs Asha Ramrajsingh was offended by the words used and the manner of delivery. I am satisfied Mrs Asha Ramrajsingh saw the claimant's conduct as aggressive and inappropriate. It is for that reason that the claimant was asked by an email on 21 October to attend a meeting and that is why the meeting took place and the allegation was put. The incident needs to

be described in some manner. I am satisfied that there is no evidence from which I could conclude that the use of the terms 'rude,' 'loud,' and 'aggressive' were motivated consciously or subconsciously by a stereotype. The words were chosen as they best described Mrs Asha Ramrajsingh's perception. Mrs Asha Ramrajsingh reacted to behaviour which she genuinely considered to be rude. It follows that this was not an act of race discrimination or harassment. It is a legitimate managerial reaction, and it was not a breach of contract.

7.16 I find the claimant has not shown, by any credible evidence, that the respondent showed any failure in its duty of care. The weight of the evidence demonstrates that the respondent continued to engage with the claimant and take her concerns about undertaking work on the inbox seriously. Ultimately, the respondent made adjustments, to the detriment of the department, to accommodate the claimant. This demonstrates a reasonable managerial response which fully took into account the claimant's concerns. I am not satisfied there was any delay. Moreover, as noted above, it would have been reasonable for the respondent to insist on the claimant undertaking her duties. There is no evidence to support the assertion the respondent showed a lack of concern for the claimant's mental health and well-being.

7.17 The claimant asserts that her role was deleted as a response to her raising concerns about the allocation of the inbox. The claimant has produced no evidence. Mr Sam Pandya gave clear evidence and demonstrated how the claimant's role was considered in the context of an ongoing restructuring program. I am satisfied that the deletion of her role was for legitimate business reasons and it was within the discretion of management. In no sense whatsoever was it because of the claimant's complaints.

7.18 I do not accept that the respondent failed to offer redeployment opportunities. The claimant had an option to apply for any jobs which were available and she had the full support of the union. The respondent is not obliged to create jobs which do not exist.

7.19 The claimant makes a general allegation that the respondent failed to comply with its policy in relation to redundancies and restructuring. This is not particularised, and it is unclear what is meant. There is no evidence to suggest that the respondent breached any of its own policies and I observe that the process was scrutinised by the union; the claimant had benefit of union advice.

7.20 In neither the claimant's statement nor her claim form does she identify, adequately, what might be seen as a last straw. In EJ MaCarthy's management order, the last straw was identified as the notification her role and been deleted. It is implicit EJ McCarthy assumed the expression of interest on 21 January 2022 was the resignation. This is inconsistent with the way the claimant's case is put at the hearing. What was said to be the last straw, if any, was not made clear in the claimant's evidence.

7.21 Notifying her of the deletion of a post was part of a legitimate redundancy exercise. It will be rare that identifying the risk of redundancy because of a proposed restructure will itself be a breach of contract, albeit there may be an intention to terminate the employment. An employer, contractually, has the right to terminate a contract. Termination per se is not a breach of contract. It follows that legitimate termination is unlikely to be a breach of contract.

7.22 In this context, I should now consider the respondent's contention that the contract came to an end by mutual consent.

7.23 I must have regard to all the circumstances. I should be concerned to analyse the substance and not simply consider the form.

7.24 It is respondent's case that the combination of the expression of interest and thereafter the acceptance demonstrates mutual consent.

7.25 To the extent the respondent identifies the relevant circumstances they are set out in the submissions. The most relevant paragraphs are set out below:

> **4. R contends that in considering who terminated the contract, the position C takes in her ET1 and statement are of key importance:**
>
> - **C has always been clear (p. 20, 1st para) that she regards herself as constructively dismissed, based on Camden's mistreatment of her and "mis-use of an ongoing restructure process…to dismiss me or prompt my resignation". Prior to the amendment of her claim on 12.7.23, she had not said that she had been dismissed;**
> - **C says in her ET1 that "After the way I had been treated, I felt that my position had become untenable. In the absence of the restructure I would simply have resigned" (top paragraph of p. 22) and "..my case for constructive dismissal is based on the Council's behaviour towards me as an employee which would have inevitably led to my resignation, as my position had become more and more intolerable by management. The restructure simply provided an alternative way of achieving this (redundancy)" (2nd para of p. 22)**
> - **Para 57 of C's statement refers to her work environment being disturbing, of which the thought of being around it again made her anxious, she did not want to return to a (bullying harassing) workplace and described the environment as "horrendous".**
> - **C at the case management discussion of 2 February 2023 clearly indicated her reliance on the "last straw" principle, which is said to have "made her apply for voluntary redundancy on 21 January 2022" (p.61).**
>
> **5. From these passages it is clear that due to past events, C intended to leave - it was inevitable, and that when she experienced the "last straw" of R's further conduct, she applied for the voluntary redundancy package on 21.1.22 using this a vehicle by which to leave. This speaks of a termination process initiated by C, not by R. This is a very different scenario from that of an 'ordinary' redundancy process, without any past history or subsequent intervening events, where an employer makes available the possibility of applying for voluntary enhanced redundancy packages; termination through such process would not preclude there being a straightforward dismissal.**
>
> **…**

**Option ii: mutual termination**

**25. R's alternative contention is that there was a mutual termination of contract. These facts are highly analogous to the Court of Appeal case of *Birch v University of Liverpool* [1985] ICR 470. Although that involved invitations under an early retirement scheme due to a need to reduce staff because of insufficient university funds, R submits that this does not affect the principle that an unforced offer to take up a voluntary scheme, and the employer's acceptance can constitute a mutual termination of agreement.**

**26. *Birch v University of Liverpool* involved an early retirement scheme where staff were invited to apply for early retirement which was subject to final approval by the employer. The claimants applied under the scheme and their application was approved by the employer, but the claimants subsequently applied for redundancy payments. The tribunal held that the claimants had been dismissed, but the appeal tribunal found that the contract had been terminated by mutual consent, so that there had been no dismissal.**

**…..**

**29. The facts of Birch (which found a consensual termination) are very similar to Ms Bonnett's case. Bearing in mind the Court of Appeal's instruction to looks at the "realities of the facts" rather than the forms of the transactions, although there was a dismissal letter from the Respondent dated 14.2.22, one cannot ignore C's case that she wanted to leave and essentially used the voluntary redundancy process to effect her intention to leave, because she found the workplace "horrendous" and it filled her with anxiety, such that even if redundancy had not been offered, she would have left anyway. Her application was not 'forced' on her albeit she may have held an unjustified perception that it was, but it was certainly not a given that the restructure would result in C leaving. There were opportunities for filling vacant posts or going into the redeployment pool but Mr Power has told the tribunal that C was only interested in staying within the CATS team, which wasn't available. R would suggest that looking at the reality of the situation, the evidence taken as a whole, strongly supports this being a consensual termination of contract.**

7.26 It is possible to distil from this number of themes which are said to constitute the relevant circumstances as follows:

7.26.1 there was a background dispute which led the claimant to believe that the environment was horrendous, and continued to remain so.

7.26.2 The claimant would have resigned at some point in any event.

7.26.3 The claimant has asserted that she was constructively dismissed.

7.26.4 The claimant saw the announcement of redundancy as a last straw.

7.26.5 That alleged last straw led to an application for voluntary redundancy.

7.26.6 The circumstances are said to differ from an "ordinary redundancy." It appearing to be the respondent's position that the claimant's intention to resign, and our application redundancy, which means it is not a "ordinary redundancy."

7.26.7 The circumstances of this case are akin to that of **Birch** where the matter concerned voluntary early retirement.

7.27 Is the respondent right that this was not an "ordinary redundancy?" Restructuring processes are common. They may affect employees of all ages, and regardless of the position held in an organisation. Many

restructuries lead to jobs fundamentally changing, a reduction in the need for employees of a particular type, or a reduction in the need for employees to undertake a particular type of work. Employers who lose their jobs in those circumstances will normally be dismissed by reason of redundancy.

7.28 To avoid compulsory redundancies, many strategies may be applied. One of those strategies is, undoubtedly, natural wastage. One way of achieving that natural wastage is through retirement. Individuals considering retirement may be prepared to leave earlier, particularly if there is an enhanced termination package. It may be said that the termination of contracts for those who are retiring, who intended to retire anyway, may not be attributable to the redundancy situation. It is a question of fact.

7.29 It is well recognised that voluntary retirement and voluntary redundancy are not necessarily synonymous. Voluntary redundancies are often dismissals. It is common for an employer to request voluntary redundancies. To encourage voluntary redundancies, enhanced packages will often be offered. An enhanced package was offered here. Although it is unclear how far that provided a significant incentive for this claimant, there can be no doubt the respondent's purpose was to encourage voluntary redundancy.

7.30 An employee who sees termination as inevitable, may prefer to have voluntary redundancy, with an enhanced package, rather than to wait for the inevitable dismissal. That is not a retirement.

7.31 It is unclear why the respondent asserts, on the one hand, that this is not an "ordinary redundancy," but simultaneously asserts that the reason for termination was redundancy. Moreover, it is the respondent's case that any redundancies came about as a result of a proper and legitimate restructuring exercise which led to a reduction in the need for employees of a particular kind, or for employees to undertake work of a particular kind of work. Moreover, the respondent refutes, completely, any suggestion that any part of the process, which involved consultation with individuals and with full union involvement, was directed at any particular individual, including the claimant. The suggestion that this was not a "ordinary redundancy" situation is difficult to understand, inconsistent wit the respondent's defence, and entirely without merit.

7.32 Seeking voluntary redundancies was part of that process. This was achieved by expressions of interest, which the respondent was free to reject. The claimant's request was accepted. On the respondent's case it was accepted because it fulfilled its business objective and was consistent with the aims of the restructure. It would not have been accepted if the respondent wished to retain the claimant because she fulfilled a particular position and it wished to retain the services. This is consistent with advancing the process of redundancy, as envisaged by the restructuring process.

7.33 It was the respondent that chose to restructure. It was the respondent that chose to delete jobs. It was the respondent that chose to delete the claimant's position. It was the respondent that chose to offer voluntary redundancy. It was the respondent that chose to offer an enhanced redundancy package. It was the respondent that chose how to proceed with the consultation, and how to allocate the remaining jobs. It was the respondent that chose to accept the expression of interest.

7.34 Against all this, the respondent says the claimant would have resigned in any event.

7.35 The claimant may have resigned at some point. The claimant did not resign, at any point resign, even though she considered the respondent's actions to be inappropriate. The claimant was concerned that the atmosphere would not improve. However, I accept her evidence that she would have contemplated remaining had she been offered a job.

7.36 It was clear that if the claimant did not accept voluntary redundancy, the process would continue and there was a high probability that she would be dismissed. There was enhanced package offered to encourage voluntary redundancies, albeit the claimant stated in her evidence that the enhanced package was not a particular reason for her.

7.37 There may be many occasions when an employee is dissatisfied with an employer, and that dissatisfaction forms part of the reason for accepting a voluntary redundancy. That may provide some motive for the claimant, but that does not mean that the respondent's reason for seeking redundancies becomes irrelevant.

7.38 I do not accept it is inevitable the claimant would have left. She remained employed despite being extremely unhappy for many months and matters had improved by the time the redundancy process occurred. In any event, an overarching unhappiness, and the possibility of resignation, does not demonstrate mutuality of approach. Even where an individual would welcome termination of employment, that does not mean terminating the employment is mutual.

7.39 I reject the suggestion that the circumstances of **Birch** are akin to the circumstances of this case. They are not. It is necessary to look at the substance not the form. When the employer has taken a unilateral decision to terminate a position, it matters not whether that decision is resented, welcomed, or invited by the employee there will be a dismissal, and that is the case here. That dismissal came about as a result of the letter of 14 February 2022 which gave notice expiring on 12 April 2022.

7.40 In all the circumstances I find that the claimant was dismissed by letter 14 February; her employment ended on 12th of April 2022.

7.41 I next need to consider whether the dismissal was fair.

7.42 There was an ongoing process which was overseen by the claimant's union. Warning was given of the process and the potential for redundancies. Consultation was undertaken, both collective and individual. There is no suggestion the union was not consulted. The respondent identified ways to mitigate the effect of redundancies. This included voluntary redundancy, job matching, and ring-fencing opportunities. There is no suggestion that this was not agreed with the union. As the claimant's position was unique, there is no argument advanced that she was not placed in an appropriate pool of employees. It follows that there was no call for selection criteria in relation to the claimant's position.

7.43 The claimant chose to seek voluntary redundancy. Had she decided not to seek voluntary redundancy, there would have been further identification of opportunities and ultimately, she would have entered into a redeployment pool. As she chose to accept voluntary redundancy, the process, as it related to her, came to an end at that point. Requesting voluntary redundancy is a legitimate part of a redundancy exercise. The claimant's motivation for accepting it is of limited, if any, relevance.

7.44 Had she requested voluntary redundancy because the respondent was in breach of contract, it may have rendered the entire process unfair. However, for the reasons I have given, I am satisfied that the respondent acted reasonably at all times. Whilst the claimant was no doubt unhappy and disgruntled, I find there were no reasonable grounds for this.

7.45 In all the circumstances, I find that there was a dismissal, but the dismissal was not unfair.

_____

Employment Judge G Hodgson

Dated: 29 August 2023

Sent to the parties on:

.25/09/2023

For the Tribunal Office