EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000034/2023

Held at Aberdeen on 31 August & 1 September 2023

Employment Judge N M Hosie

Mrs E Idzikowska	**Claimant** **In Person**
Aberdeenshire Council	**Respondent** **Represented by** **Mr R Taylor,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claim is dismissed.

REASONS

1. Mrs Emma Idzikowska claimed that she was constructively and unfairly dismissed by the respondent, Aberdeenshire Council. The respondent denied her claim.

The evidence

2. I first heard evidence from the claimant. She spoke to a written Statement which is referred to for its terms.

3. I then heard evidence on behalf of the respondent from:-

- Christine Milne, Principal Teacher of Technical at Peterhead Academy
- Gerard McCluskey, Acting Head Teacher at Peterhead Academy

4. A Joint Bundle of documentary productions was also submitted ("P").

The facts

5. Having heard the evidence and considered the documentary productions, I was able to make the following findings in fact. The claimant was employed by the respondent as a Supply Teacher at Peterhead Academy ("the School"). She started working there on 19 April 2022. She had agreed a one year contract. She taught Technical.

Employer Engagement Volunteer Scheme ("the Scheme")

6. The claimant was instrumental in setting up this Scheme to help the Technical and Maths Departments at the School. She was actively involved in setting up a partnership working agreement with Score Group, an engineering Company and local firm. Her contact at Score was Stevie Wilson. Sam Foley from "Developing the Young Workforce" ("DYW") which supports young people to prepare for work, bridging the gap between industry and education, was also involved, as the Co-ordinator assigned to the School.

7. By the end of August 2022, the claimant had volunteers from Score, for both Maths and Technical Departments, leading some lessons. The Scheme was also expanded to include other Companies. It proved to be a great success.

Meeting with the new Acting Head Teacher, Gerard McCluskey, on 15 September 2022

8. Mr McCluskey was appointed Acting Head Teacher at the School in August 2022. He met the claimant on his first day at the School. She told him about the Scheme and suggested that they arrange a meeting to discuss it.

9. On 22 August, the claimant sent an e-mail to Mr McCluskey and others with an update on the Scheme and to advise that she was looking to expand it (P.22).

10. On 26 August, the claimant sent an e-mail to Mr McCluskey which prompted a meeting between him and the claimant on 15 September in his office (P.25).

11. There was no note of the meeting and I was faced with a conflict in the evidence which I heard between the claimant and Mr McCluskey who were the only attendees at the meeting.

12. The claimant said that the meeting lasted about forty minutes but that Mr McCluskey had to excuse himself and leave his office at one point to attend to another matter, before returning.

13. The claimant had been quite open with the respondent and her colleagues that she had a “second job” working as a Security Guard at nights for Score at their premises. She was engaged by Score through an Agency. Having that additional employment was not an issue for the respondent. She claimed that the “first thing” that Mr McCluskey told her at the meeting was that she could no longer be involved in the Scheme “as she worked at Score”. She

said that this implied a conflict of interest and that she was being accused of "criminal wrongdoing". She also said that Mr McCluskey told her that it was in her "best interest so as to not cause any problems with her work at Score". She said that she was "totally shocked, to say the least ,and just kind of went into autopilot". There was further discussion about "equity" and how the Scheme could be expanded to include other children. There was further discussion about the previous owner of Score and she got the impression that Mr McCluskey knew him and his family.

14. However, Mr McCluskey gave a quite different account of what had transpired at his meeting with the claimant. He said that the meeting lasted some 20 minutes. He had no recollection of leaving the meeting and returning. He was "very happy" with the Scheme as it, "put the School at the forefront of the community". He was "very impressed" with what the claimant had achieved and acknowledged that she had "taken a lead". However, the Scheme had started before his arrival at the School and as Head Teacher at the School he wanted to know all about it.

15. Mr McCluskey strenuously denied the allegation that he had informed the claimant that her involvement in the Scheme had to stop. However, he did have a concern that her work as a Security Guard might give rise to a "conflict of interest", but he denied that he had accused the claimant of such. He explained that he was concerned that when working at Score she would be approached and asked to discuss the Scheme and School business. He was concerned that this might give rise to a breach of contract on her part. As he put it, he wanted "to keep her safe". He also said that he, "wanted to make sure she wasn't burning herself out".

16. He thanked her for her hard work and, as he knew that her contract was a temporary one, he asked her if she wanted to make it permanent. However, she said that "it wasn't right for her at that time".

17. He also asked the claimant if she wanted to work five days each week instead of four but again she said it "wasn't right for her".

18. Mr McCluskey said that he was "very surprised and concerned" when the following day Stevie Wilson forwarded the claimant's e-mail which she had sent to him at 08:57. In that e-mail the claimant said she was, "likely to be taken off partnership working due to a perceived conflict of interest" (P.28/1).

19. In view of the curt terms of Mr Wilson's e-mail, Mr McCluskey called him immediately as he was concerned about the School's relationship with Score. He reassured him that he was perfectly happy with the Scheme and what Score was doing.

20. He had then "gone looking" for the claimant but was advised that she had been "signed off sick" that day.

Claimant's resignation

21. Mr McCluskey was also surprised to receive the claimant's resignation e-mail later that day (P.31/2) which was in the following terms:-

"*Due to a perceived conflict of interest I feel my position in the School was no longer tenable. I believe the Volunteer Scheme (along with all industry engagement) is a value to the School and have no wish to jeopardise it. I am on S56 daily supply so this can take effect immediately. I have no wish to go elsewhere in the county so would like my P45.*"

22. Mr McCluskey replied by e-mail later the same day although the claimant maintained that she did not receive the e-mail until 29 November. It was in the following terms (P.31/1):-

"*I am very sorry to hear you feel the need to resign from your position at Peterhead Academy.*

I think you have misinterpreted some of what was discussed at our meeting (which you requested) last week, and the opportunity remains for you to come in and discuss any concerns you have.

However, if you have decided to move on and cannot see yourself coming back to Peterhead Academy, I would like to take the opportunity to thank you for the time you spent with us and for supporting our young people, particularly in Tech and Maths faculties and the work you carried out helping to establish and support our partnership with Score.

We wish you health and happiness in whatever you choose to do going forward."

23. Having considered the evidence and the documentary productions, I came to the view that Mr McCluskey's account of what had transpired at the meeting on 15 September was to be preferred. There were a number of reasons for this. Mr McCluskey gave his evidence in a measured, consistent and convincing manner and presented as credible and reliable. It was the claimant who had requested the meeting with him which was somewhat at odds with the claimant's contention that right at the start of the meeting Mr McCluskey told her that she should no longer be involved in the Scheme.

24. Further, on both accounts, the meeting lasted at least twenty minutes and although there was no Note of the meeting, this suggests that other matters were discussed, despite the claimant alleging she was "shocked".

25. Also, in her e-mail early the next morning to Mr Wilson the claimant does not say that she has been taken off the partnership, only that she is "likely" to be (P.28/1). This is again at odds with her evidence that at the start of the meeting Mr McCluskey told her he was taking her off the Scheme.

26. Significantly, I also heard evidence on behalf of the respondent from Christine Milne, the Principal Teacher of Technical at the School. Ms Milne also gave her evidence in a convincing manner and presented as entirely credible and reliable. She met the claimant immediately after her meeting on 15 September with Mr McCluskey. She was aware that they were to be meeting that day. Her understanding was that the purpose of the meeting was to "discuss the way forward" with the Scheme. She spoke to the claimant immediately after the meeting and asked her how she had got on. She said

that the claimant was "reasonably positive" and appeared "pretty ok". She made no mention of Mr McCluskey informing her that she had to stop her involvement in the Scheme. She told Ms Milne that they had discussed making the Scheme more "equitable", which I understood to mean involving more children and departments. The claimant did not appear either unhappy or upset.

27. Ms Milne also said that her colleague, Evan Ritchie was there when she met the claimant and, "he felt the same" as she did.

28. Further, the claimant's e-mail to Mr Wilson on 15 September about the Scheme, sent *after* the meeting, is normal and makes no reference to her having been removed from the Scheme and being upset (P.28/2).

29. Also, if the claimant's account of the meeting was correct, this would mean that, although he knew about the Scheme on the day he started at the School and of the claimant's involvement, Mr McCluskey waited for a number of weeks before telling her that she could not be involved. This would have been a significant decision, not something likely to be delayed in communicating and something Mr McCluskey would probably have confirmed in writing,

30. Finally, another reason for preferring Mr McCluskey's account was that there was no evidence from any other source, in any form, to support the claimant's allegations, only her own evidence.

31. Some months after her resignation, on 18 September 2022, the claimant sent an e-mail to Mr McCluskey and others (P.36/2). She was incensed and upset when she saw publicity concerning the Scheme (P.32) featuring Mr McCluskey. As I understand it, she was annoyed that Mr McCluskey appeared to be taking credit for the success of the Scheme when its success had been due, in no small measure, to her. She accused him of "glory seeking".

32. Both Mr McCluskey and Ms Milne were surprised to receive the claimant's e-mail. After taking advice from HR, Mr McCluskey advised everyone who had received the claimant's e-mail not to respond (P.36/1).

33. He also asked Ms Milne to record, in writing, what had happened and how the claimant presented, when she met her, immediately after the claimant's meeting with him on 15 September On 18 November, Ms Milne sent an e-mail to Mr McCluskey in the following terms (P.36/1):-

"*After the meeting with Emma on 15 September, she returned to the department pretty enthusiastic about moving the partnership forward. We were in the staff base at the time, and I asked her how it had gone. She advised she had been given feedback about parents being keen to have more pupils benefitting from the Score volunteers in classes and said there would be some discussion around looking at timetables to see if there was a way to make it more equitable. We talked about new projects always having a pilot period and time for a valuation what has gone well and where improvements can be made. We also spoke about the fact that it was great publicity if parents through word of mouth are aware of the partnership before any formal announcement. In all it was a really positive chat and quite reflective. None of the points she stated in her e-mail today were mentioned.*

ER (Evan Ritchie) and I were both in the staff base at the time with Emma."

34. When giving evidence at the Tribunal Hearing, Ms Milne confirmed that this was in accordance with her evidence.

35. I find in fact, therefore, that Mr McCluskey did not advise the claimant that she should no longer be involved in the Scheme. It made no sense for him to have said that. I find in fact that Mr McCluskey did not accuse the claimant of a "conflict in interest". I find in fact that Mr McCluskey did not accuse the claimant of "criminal wrongdoing". In my view, Mr McCluskey was supportive of the claimant at the meeting on 15 September and expressed his appreciation of the significant part she had played in the success of the Scheme. Mr McCluskey's evidence and that of Ms Milne, along with the contemporaneous e-mails are all consistent with such findings.

36. There also appears to me to be some force and logic in Mr McCluskey's contention that the claimant had "misinterpreted some of what was discussed at our meeting" (P.31/1). It was clear that the claimant was extremely passionate about the Scheme and rightly proud of her involvement. She misunderstood what Mr McCluskey was conveying to her, but that was not his fault. He was supportive and in no way critical of her involvement in the Scheme.

Respondent's submissions

37. The following is a brief summary of the submissions by the respondent's solicitor. He reminded me, with reference to ***Western Excavating (ECC) Ltd v. Sharp*** [1978] ICR 221, that the onus was on the claimant to establish that the respondent was in breach of contract. He submitted that, "despite a considerable amount of evidence", there was insufficient to establish that the respondent was in breach of contract.

38. Mr McCluskey denied that he had advised the claimant that she should no longer be involved with the Scheme, but, even if he had done so, that would have been a legitimate instruction for Mr McCluskey, as Head Teacher, to have given.

39. The respondent's solicitor also referred, not only to Mr McCluskey's evidence, but also the evidence of Christine Milne and the contemporaneous e-mails, including the claimant's e-mail of 16 September 2022 in which she said that she was "**likely** to be taken off partnership working" (P.28/1).

40. He submitted that Mr McCluskey's evidence should be accepted and if it was then the claimant was not constructively dismissed.

Claimant's submissions

41. The following is a brief summary of the claimant's submissions. She submitted that the reason for her resignation was a, "combination of being told to stop doing something I was passionate about and being accused of having a conflict of interest" which she maintained "devastated her".

42. She submitted, with reference to ***Malik v. Bank of Credit & Commerce International*** [1997] IRLR 462, that the respondent was in breach of the implied duty of trust and confidence.

43. She submitted that Mr McCluskey's evidence was inconsistent and there was no evidence of either Mr McCluskey or Alison Gardner trying to contact her on 16 September.

44. So far as Christine Milne's evidence was concerned, she reminded me that Ms Milne accepted when giving evidence that she (the claimant) would not confide in her.

45. Further, she submitted that Mr McCluskey didn't seem to understand what a conflict of interest really meant and there was, "no reason for him accusing me of a conflict of interest".

46. She said that she had "no interest in publicity", but that all the photos on social media featured Mr McCluskey and no other members of staff.

Discussion and Decision

Relevant Law

47. Having resigned, it was for the claimant to establish that she had been constructively dismissed. This meant that, under the terms of s.95(1)(c) of the Employment Rights Act 1996 ("the 1996 Act"), she had to show that she terminated her contract of employment (with or without notice) in circumstances such that she was entitled to do so, without notice by reason of her employer's conduct. It is well established that means that the employee is required to show that the employer is guilty of conduct which is a fundamental 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. The employee, in those circumstances, is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle the employee to leave at once.

48. The correct approach to determining whether or not there has been a constructive dismissal was discussed in ***Western Excavating***, the well-known Court of Appeal case, to which I was referred. According to Lord Denning, in order for an employee to be able to establish constructive dismissal four conditions must be met:-

(1) there needs to be an actual or anticipatory breach of the contractual term by the employer;
(2) such a breach must be sufficiently serious (a "fundamental breach") to justify the employee's resignation;
(3) that he or she resigned in response to the breach;
(4) that he or she did not delay too long in resigning in response to the employer's breach, affirming the contract and losing the right to claim constructive dismissal.

49. Accordingly, whether an employee is entitled to terminate his or her contract of employment, by reason of the employer's conduct and claim constructive dismissal, must be determined in accordance with the law of contract. It is not enough, therefore, to establish that the employer acted unreasonably. The reasonableness, or otherwise, of the employer's conduct is relevant but the extent of any unreasonableness has to be weighed and assessed and a Tribunal must bear in mind that the test is whether the employer is guilty of a breach which goes to the root of the contract or shows that the employer no longer intends to be bound by one or more of its essential terms.

Implied term of trust and confidence

50. So far as the present case was concerned, I was particularly mindful that there is implied into all contracts of employment a term that employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. It was a breach of that implied term which the claimant relied upon. Any breach of this implied term is a fundamental breach amounting to a repudiation since it necessarily goes to the root of the contract.

51. Browne-Wilkinson J in ***Woods v. WM Car Services (Peterborough) Ltd*** [1981] ICR 666 described how a breach of this implied term might arise:

"*To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that it's effect, judged reasonably and sensibly, was such that the employee cannot be expected to put up with it.*

52. Further, in ***Malik***, to which I was referred by the claimant, Lord Steyn stated that in assessing whether or not there has been a breach of the implied obligation of mutual trust and confidence it is the impact of the employer's behaviour on the employee that is significant – not the intentions of the employer. However, the impact on the employee must be judged objectively.

53. When I considered the authorities, I recognised that a wide range of behaviour by employers can give rise to a fundamental breach of the implied terms of mutual trust and confidence. However, the breach has to be "repudiatory" in order for a claimant to rely upon it. Therefore, serious misconduct is required from the employer. This was emphasised by the EAT in ***Frenkel Topping v. King*** EAT/01606/15. In that case Langstaff J said at paras. 12 and 13 that the test of breach:- "*is a demanding test. It has been held (see for instance the case of* ***BG v. O'Brian*** [2011] IRLR *at paragraph 27), that simply acting in an unreasonable manner in not sufficient. The word* qualifying "damage" is "seriously". *This is a word of significant emphasis*. *The purpose of such a term is identified by Lord Steyn in* ***Malik*** *as* being '*apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited.*"

The present case

54. My findings that Mr McCluskey had not advised the claimant at the meeting on 15 September 2022 that she should no longer be involved in the Scheme and that he had not accused her of a conflict of interest, were crucial to my deliberations.

55. It was not entirely clear to me what Mr McCluskey meant by a potential conflict of interest, in the particular circumstances in which the claimant found herself. I rather think that what he was conveying to the claimant was that when she was working at Score she should be careful not to divulge any confidential information about the School and the pupils. He only wanted her to deal with the Scheme during her working hours at the School where she had management support. In my view, that was perfectly understandable. He believed that what he was saying to her was in her best interests.

56. In any event, he did not advise the claimant that she must stop her involvement in the Scheme. He did not accuse her of a conflict of interest. He did not accuse her of "criminal wrongdoing".

57. In my view, he had the best of intentions. He was endeavouring to be supportive and to express his appreciation of the work the claimant had done in establishing the Scheme.

58. However, it was perfectly understandable that as Head Teacher, with overall responsibility for all aspects of the School, he would want, and indeed require, to know all about the Scheme and be kept abreast of developments.

59. It appeared to me that possibly because of her passion for the Scheme and her understandable pride in what she had achieved that as Mr McCluskey thought, she had "misinterpreted some of what was discussed".

60. She did not appear to be either upset or aggrieved either at her meeting with Mr McCluskey or immediately thereafter.

61. Her decision to resign the following evening (P.31/2) was based therefore on a misunderstanding but not one for which the respondent or Mr McCluskey was responsible.

62. Some months after her employment had ended and not therefore directly relevant to the issues with which I was concerned, her passion for and extreme sensitivity about the Scheme was demonstrated by her vitriolic e-mail response on 18 November (P.36/2). to seeing the Press and Media releases about the Scheme, featuring Mr McCluskey along with photographs of him (P.37).

63. This response was a complete overreaction on her part. She accused Mr McCluskey of "glory seeking" and "taking credit for her work". It was no such thing. It was perfectly understandable that Mr McCluskey, as Head Teacher,

and, in a sense, the "face of the School" would feature in this way, "promoting the Academy in a positive way" as he put it. Also, I believed Mr McCluskey when he said that if the claimant had not left she probably would have featured in the photos as well. This passion and apparently extreme sensitivity on her part might possibly explain why she misunderstood what Mr McCluskey was saying at their meeting on 15 September. She did not seem to even contemplate the possibility that there might have been a misunderstanding on her part and seek further clarification and confirmation from Mr McCluskey. Her resignation was peremptory.

64. For all these reasons, therefore, I arrived at the view, and I am bound to say without a great deal of difficulty, that the claimant had failed to establish that the respondent was in breach of contract: in breach of the implied term of trust and confidence. The onus was on her to establish the breach. She failed to do so.

65. Accordingly, her claim that she was constructively and unfairly dismissed is dismissed.

Employment Judge: N M Hosie
Date of Judgement: 8 September 2023
Date sent to Parties: 8 September 2023