EMPLOYMENT TRIBUNALS

Claimant: Mrs Natalie Hadden

Respondent: M & C Saatchi Worldwide Limited

Heard at: London Central (by CVP) On: 19, 20 December 2023

Before: Tribunal Judge Jack, acting as an Employment Judge

Representation
Claimant: Mr David Wynn (Head of Employee Relations at the respondent)
Respondent: Mr Paul Hadden (husband of the claimant)

RESERVED JUDGMENT

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

REASONS

Background and Issues

1. This is a claim for unfair dismissal.

2. The claimant resigned on 12 July 2023. ACAS was notified on 12 July 2023 and a certificate was issued on 11 August 2023. The claim was presented on 18 August 2023.

3. The issues in the case were discussed with the parties at the beginning of the hearing, and were agreed to be as follows.

1. Unfair dismissal

1.1 Was the claimant dismissed?

1.1.1 Did the respondent do the following things (as alleged in the claimant's letter of resignation):

1.1.1.1 Attempting to unilaterally change the claimant's place of work from one day a fortnight in the office to two days a week when this had been agreed as a permanent change in 2021;

1.1.1.2 Refusing the claimant's flexible working request and appeal without relying on any of the potentially fair statutory reasons;

1.1.1.3 Not responding adequately in the grievance or grievance appeal to the claimant's questions;

1.1.1.4 Informing the claimant at the beginning of the grievance appeal meeting that a decision had already been made regarding her appeal;

1.1.1.5 Stating in the grievance outcome letter that at the grievance appeal meeting the claimant had agreed to work one day a week in the office when she had not done so.

1.1.2 Did that breach the implied term of trust and confidence? The Tribunal will need to decide:

1.1.2.1 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

1.1.2.2 whether it had reasonable and proper cause for doing so.

1.1.3 Did the respondent breach a contractual term that the claimant could work remotely except for one day a fortnight?

1.1.4 Was any 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.

1.1.5 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.

1.1.6 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.

2. Remedy for unfair dismissal

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

2.1.1 What financial losses has the dismissal caused the claimant?

2.1.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

2.1.3 If not, for what period of loss should the claimant be compensated?

2.2 What basic award is payable to the claimant, if any?

Procedure

4. The respondent applied at the beginning of the hearing for the claim to be struck out on the basis that it had no reasonable prospect of success. I rejected that application. I was not satisfied that the claimant had no reasonable prospect of success, and considered that it would be better to determine the issues having heard evidence and argument from both parties.

5. There was a bundle of 175 pages. Two further documents were supplied to the tribunal and the respondent on the second day of the hearing: a "script" which the claimant spoke from at the remote flexible working appeal on 12 September 2022; and claimant's pay slip for July 2023.

6. There were two witnesses: Mrs Natalie Hadden (the claimant); and Miss Chloe Marshall (People Operations Manager in HR).

Findings of Fact

7. The claimant was employed by the respondent as Senior Financial Reporting Manager from 18 October 2004.

8. The claimant had a written contract and she initially worked full-time. Her contract provided that:

    a. Her normal place of work was 36 Golden Square, London, W1F 9EE (p. 48).

    b. She would receive statutory sick pay during any period of sick absence in accordance with the statutory rules. Any payment made to top this up would be at the discretion of the respondent and depend on individual circumstances (p. 49).

    c. Once her probationary period had come to an end, her notice period was three months (p. 52).

9. The claimant's contract was varied on 20 October 2009, following her return from maternity leave. She was to work for two days in the office on Tuesdays and Wednesdays and two half days at home on Mondays and Thursdays (p. 54).

10. The claimant's contract was varied again on 30 June 2010. She was to work in the office on Tuesday, Wednesday and Thursday and at home on Friday (p. 55).

11. The claimant's contract was varied again on 25 July 2011. She was to work in the office on Monday, Wednesday and Friday and two half days at home on Tuesday and Thursday (p. 56).

12. There were national lockdowns beginning in each of March 2020, November 2020 and January 2021.

13. In February 2021 Michael Saunders, the claimant's line manager, asked her whether she could accommodate more hours in her working week.

14. The claimant emailed Michael Saunders on 21 February 2021 proposing that she should work five days a week, and that post covid she should work from home Monday to Friday but come into the office once every two weeks, once that was again permitted, to collect paperwork and have meetings with colleagues (p. 60).

15. Michael Saunders replied on 1 April 2021 proposing that her salary increase to £72,500 and that she would work four days a week (p. 59).

16. The claimant and Michael Saunders agreed orally, during a remote one to one meeting, that she would come into the office once a fortnight (claimant's witness statement, paragraph 35, and her oral evidence). This meeting took place after the email exchange between Mr Saunders and the claimant just summarised and before the signing of the variation of contract on 4 May 2021. It took place in the context of their discussions regarding a proposed variation to her contract. I say this on the basis of the claimant's oral evidence, which I found credible on this point. Further, it is clear that the claimant feels very aggrieved at what she regards as the failure of the respondent to abide by an agreement she reached with Michael Saunders. The best explanation for this very obvious and genuine sense of grievance, which was clear when she gave evidence, is that she did indeed reach an oral agreement with Micheal Saunders that she would come into the office once a fortnight, an agreement which she believes should be honoured.

17. Michael Saunders emailed HR on 12 April 2021 saying that he had agreed that the claimant would work four days a week with an annual salary of £72,500 (p. 65). The subsequent email chain clarified that Wednesday would be the claimant's non-working day, but did not address what her normal place of work would be. There was no discussion between Michael Saunders and HR about what, if anything, had been agreed about that.

18. The claimant's contract was varied again on 4 May 2021. Her salary was increased to £72,500 and her working week was Monday, Tuesday, Thursday and Friday. It was said that all other terms and conditions remained the same as before (p. 57). Nothing was said in this document about place of work.

19. Michael Saunders left the employment of the respondent at some point.

20. Between May 2021 and May 2022 the claimant worked at home, attending the office one day every fortnight.

21. On 23 May 2022 Michael Ferguson, who was now the claimant's line manager, emailed the team (including the claimant) saying that he would like everyone in the office two days a week on Monday and Thursday.

22. The claimant replied saying that when she negotiated a change in her contractual hours with Michael Saunders it was discussed that on

returning to normal business after covid she would only be in the office one day a fortnight (p. 73).

23. The claimant's sons were at this time aged 14 and 12 years old.

24. On 21 June 2022 Michael Ferguson wrote to the claimant saying that the claimant was contractually required to work four days a week. Her request to attend the office once every two weeks had not been incorporated into the variation of contact dated 4 May 2021 which the claimant had signed. Colleagues were required to attend the office at least two days a week. He was however willing to show flexibility and to agree that the claimant attend the office only once a week. There would be a review of these arrangements in three months, to ensure that the needs of the business were being met (p. 81-82).

25. On 28 June 2022, solicitors acting on behalf of the claimant wrote to the respondent (p. 82A-82B). Their letter said that the parties had acted in accordance with the claimant's suggestion in her email of 21 February 2021 to Michael Saunders that she would come into the office once a fortnight post covid, and that this had become a binding part of her employment contract. This letter stated that it would be open to the claimant to resign and bring a case for constructive unfair dismissal.

26. Mr Wynn wrote to the claimant on behalf of the respondent on 8 July 2022. He said that he accepted that the claimant had not understood that her request to work from home and only come into the office every fortnight had not been agreed in the variation of contract dated 4 May 2021. He suggested that the claimant now appeal the decision not to accept her flexible working request or make a new flexible working request for the respondent to consider (p.85). The claimant did not make a new flexible working request, since she considered that her original request had in fact been agreed to. She therefore made a flexible working appeal, while being clear that in her view she was not appealing against a decision to refuse her flexible working appeal, since her understanding was that a clear agreement had been reached and that the agreement was binding between the parties (p.87).

27. On 12 September 2022 the claimant attended a remote flexible working appeal. At this meeting she set out why her working arrangements were important to her, explaining her childcare responsibilities in respect of her two sons, and the additional support she provided to a family member experiencing difficulties with their health who had only recently been able to return to work (script document).

28. On 16 September 2022, the claimant was sent the outcome of her flexible working appeal (p. 104). This said that her request to come into the office once a fortnight was not accepted, and that given her seniority and experience it was vital that more junior members of the team learn from her experience. She was required to come into the office once a week, and those days could be agreed direct with her line manager.

29. On 7 October 2022 the claimant wrote to HR stating that she would continue to be on site once a fortnight as per the agreement with Michael

Saunders in 2021 (p. 106). She did in fact continue to work in the office only once a fortnight.

30. On 6 December 2022 David Wynn emailed the claimant saying that he was disappointed by her saying that she would continue to work as she had been, as this could be considered a breach of contract and potentially result in disciplinary action (p. 109).

31. On 10 February 2023 Michael Ferguson made clear in a meeting with the claimant that she needed to be in the office one day a week (claimant's witness statement, paragraph 77).

32. On Thursday 23 February 2023 the claimant attended the office in compliance with the requirement to attend once a week (claimant's witness statement, paragraph 79, and oral evidence).

33. She attempted to attend the office again the next week, on Thursday 2 March 2023, but had a panic attack on the train and returned home (claimant's witness statement, paragraph 79).

34. On Monday 13 March 2023 the claimant was signed off by her GP for stress at work for at least a month (p. 114). The claimant sent her sick note to HR from her work email.

35. The respondent has a policy that sick pay is paid at full pay for 10 days in a rolling 12 month period. Applying this policy, the claimant was paid full pay for the first ten working days of her sick leave and then statutory sick pay. This was set out in an email sent by HR on 14 March 2023 to the claimant's work email address, in reply to her email from that address. HR had not been provided with any personal email address for the claimant. HR also gave details of support available via BUPA (p. 117).

36. Michael Ferguson messaged the claimant and suggested a catch up call, but the claimant replied that she was not yet up to it (p. 124).

37. On 6 April 2023 the claimant was signed off for a further four weeks by her GP with continued and worsening stress and anxiety.

38. On 4 May 2023 the claimant was signed off for a further two months with anxiety and depression.

39. Also on 4 May 2023 the claimant emailed Bruce Marston (Chief Financial Officer). That email was clear that the claimant was still dissatisfied about the position on her working from home (p. 139).

40. On 9 May 2023 the claimant raised a grievance relating to what she said was a failure to uphold the working arrangements agreed with Mr Saunders in February 2021, only receiving two weeks of full pay before being paid statutory sick pay while she was on sick leave, and the rejection of her flexible working appeal (p. 143-145).

41. On 9 June 2023 the claimant was sent the grievance outcome (p. 147-150). This accepted that the claimant may have discussed her preferred option of coming into the office once a fortnight with her line manager and may have worked this pattern during the pandemic, but said that the

variation of contract dated 4 May 2021 did not refer to a change in working location. The letter said that any changes to working pattern discussed had not amounted to a formal acceptance of a permanent change to the claimants terms and conditions. This letter said that although the reasons given in the letter of 16 September 2022 for rejecting the claimant's flexible working appeal did not use the exact words used in ACAS guidance, the reasons given aligned with three of the ACAS reasons i.e. negative effect on quality, negative effect on the business' ability to meet customer demand, and negative effect on performance (p. 149). With respect to sick pay, a further 10 days of her period of sick leave would be paid at full pay.

42. On 13 June 2023 claimant appealed the outcome of her grievance (p 151-152).

43. On 5 July 2023 the claimant attended a grievance appeal meeting. I am not satisfied that she was told at the start of the meeting that it had already been decided that the respondent had acted correctly. This is because, although the claimant was the only witness before me as to what was said at this meeting, she is not reliable on details such as this. I say that because (for reasons explained below) she has misread the letter giving the outcome of her grievance appeal.

44. On 7 July 2023 the claimant was sent the outcome of her grievance outcome appeal (p.159-165). This upheld the outcome of the grievance. It included a discussion of her future working arrangements and said the following, although the italics are all mine:

> "After lots of discussion you agreed that working 1 day in the office *may* be do-able for you as long as you had some flexibility as to deciding what day that would be … We talked about the together days being a Tuesday and Thursday generally and agreed that if you were able to plan in advance, choosing which day would work for you *might* be an option. *Should we be able to agree this*, I felt that this was an excellent compromise serves as hopefully the resolution we have been looking for." (p. 160-161).

45. The letter concluded by saying that the meeting had ended with a discussion of a *proposal* regarding a resolution, which included "Agreement to come to the office 1 day per week if the day of the week could be flexible" (p. 164).

46. This letter also stated that the claimant was also to receive a further 10 days full pay in respect of her period of sick leave (p. 162).

47. The claimant resigned on 12 July 2023, giving three months' notice (p. 167). She was clear in that letter that she considered herself to have been constructively dismissed. She said that she was resigning in response to a breach of trust and confidence by the respondent. The respondent's failure to reach a fair decision in her grievance appeal was the last straw in a chain of events which included:

    a. Attempting to unilaterally change her place of work from one day a fortnight in the office to two days a week, when this had been agreed as a permanent change in 2021;

b. Refusing her flexible working request and appeal without relying on any of the potentially fair statutory reasons;
c. Not responding adequately in the grievance or grievance appeal to her questions;
d. Informing her at the beginning of the grievance appeal meeting that a decision had already been made regarding her appeal;
e. Stating in the grievance outcome letter that at the grievance appeal meeting the claimant had agreed to work one day a week in the office when she had not done so.

The Law

48. An employee has the right not to be unfairly dismissed by her employer: s. 94(1) Employment Rights Act 1996 (ERA).

49. An employee who terminates the contract under which she is employed (with or without notice) in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct is dismissed: s. 95(1)(c).

50. In *Western Excavating (ECC) Ltd v Sharp* 1978 ICR 221, CA, the Court of Appeal ruled that, for an employer's conduct to give rise to a constructive dismissal, it must involve a repudiatory breach of contract. Lord Denning summarised the correct test 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. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

51. Notwithstanding Lord Denning's words just quoted, mere passage of time is not sufficient in itself for affirmation and needs to be considered in context when determining whether an employee has lost the right to resign and claim constructive dismissal: *Chindove v William Morrisons Supermarket Plc* [2014] 3 WLUK 752

52. There is an implied term that an employer will 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: *Malik v Bank of Credit and Commerce International S.A.* [1997] ICR 606.

53. When resigning and claiming to have been constructively dismissed, an employee who is the victim of a continuing cumulative breach of the

implied term of trust and confidence is entitled to rely on the totality of the employer's acts notwithstanding a prior affirmation, provided the later act forms part of the series; *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 978, paragraph 51.

54. Where an employee claims to have been constructively dismissed, it is sufficient, in the normal case, for an employment tribunal to ask itself the following questions (*Kaur v Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 978, paragraph 55):

> (1) what was the most recent act or omission by the employer that the employee says caused or triggered her resignation?
>
> (2) has the employee affirmed the contract of employment since that act or omission?
>
> (3) if not, was that act or omission by itself a repudiatory breach of contract?
>
> (4) if not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence? (if it was, there is no need for separate consideration of a possible previous affirmation.)
>
> (5) did the employee resign wholly, or partly, in response to that breach

55. In *Mari v Reuters Ltd* EAT 0539/13, HHJ Richardson said this at paragraph 49:

> The significance to be afforded to the acceptance of sick pay will depend on the circumstances, which may vary infinitely. At one extreme an employee may be so seriously ill that it would be unjust and unrealistic to hold that acceptance of sick pay amounted to or contributed to affirmation of the contract. At the other extreme an employee may continue to claim and accept sick pay when better or virtually better and when seeking to exercise other contractual rights. What can safely be said is that an innocent employee faced with a repudiatory breach is not to be taken to have affirmed the contract merely by continuing to draw sick pay for a limited period while protesting about the position …"

56. In some circumstances an employment tribunal can disregard the terms of a written agreement and instead base its decision on a finding that the documents did not reflect the parties' true intentions. The essential question was: "what was the true agreement between the parties?". The true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement was only a part. *Autoclenz Ltd v Belcher and ors* [2011] ICR 1157, SC.

Conclusions

Unilaterally changing the claimant's place of work

57. Was there a contractual term that the claimant could work remotely except for one day a fortnight? Looking first at the contractual documents, the claimant's written contract provides that her normal place of work was 36 Golden Square. Her contract was subsequently varied in 2009, 2010 and 2011 to provide that on certain days she would work at home. The position under the 2011 variation was that the claimant was to work in the office on Monday, Wednesday and Friday and two half days at home on Tuesday and Thursday. The 2021 variation says that her working week was Monday, Tuesday, Thursday and Friday. It is silent as to place of work.

58. Miss Marshall suggested that 2021 variation replaces the earlier variations: the claimant therefore had no entitlement to work at home at all. That cannot be right. Firstly, if the 2021 variation removed the claimant's right to work at home on certain days then it did not accurately reflect what was agreed. It is plain that the claimant did not agree to give up her existing right to work at home, and that she was not asked to do so. Secondly, the 2021 variation says that all other terms and conditions remained the same as before, and prior to the 2021 variation the claimant was entitled to work at home from 9:30 am to 1:30 pm on Tuesday and Thursday.

59. Read literally these documents would lead to a result that could not have been intended by the parties i.e. that the claimant was required to work on Monday, Tuesday, Thursday and Friday, her usual place of work was 36 Golden Square, but she continued to have a right to work at home from 9:30 am to 1:30 pm on Tuesday and Thursday.

60. The respondent says that in any event the claimant had no right to work at home except for one day in the office every fortnight. Focusing exclusively on the contractual documents i.e. the initial contract and the contractual variations, that is clearly correct. But the written contractual documents may not represent the whole agreement.

61. The claimant's email setting out her proposal that she work in the office one day a week is merely part of the precontractual negotiations. However I have found that the claimant *agreed* orally with Mr Saunders that she would work in the office one day every fortnight. She reached this agreement during negotiations about changes to her contract. The claimant did in fact work in the office one day a fortnight after these discussions. That is evidence of the agreement that had been reached. I do not accept that respondent's argument that the claimant simply started coming into the office one day a fortnight unilaterally.

62. I conclude that the written contract and contractual variations do not represent the whole agreement between the parties and that the actual intention of the parties was that the claimant's salary would increase to £72,500, her working week was Monday, Tuesday, Thursday and Friday, and that she would usually work at home except that she would work in the office one day a fortnight. These were the express terms of the agreement reached in May 2021. Some of these terms were written, the term regarding place of work was oral, having been expressly agreed between the claimant and Mr Saunders. Mr Saunders failed to communicate the term regarding place of work to HR. But, as I have said,

the written variation of contract did not fully represent the whole agreement.

63. On 23 May 2022 Michael Ferguson emailed the claimant saying that he would like her in the office two days a week, and he wrote to the claimant on 21 June 2022 saying that she was required to working the office one day a week. In doing so the respondent was (albeit unintentionally) attempting to impose a unilateral change in respect of the claimant's place of work.

Reasons

64. The claimant argued that her flexible working request and appeal were rejected without her being given any of the potentially fair statutory reasons. It was argued that that the respondent failed to give any of the reasons set out in the relevant ACAS guidance until 9 June 2023, when the claimant was sent the grievance outcome. I agree with the respondent that although the letter of 16 September 2022 did not use the words used in the relevant ACAS guidance, the reason given for her attending the office - it was vital that more junior members of the team learn from her experience – was in substance a reason for saying that if she was not in the office to guide and mentor more junior staff there would be a negative effect on quality and on performance. It is clear that the claimant did not agree with the reasons given, but she was given reasons and I do not consider that the reasons given breached the implied term of trust and confidence.

Responses to questions

65. I am not satisfied on the evidence before me that the respondent did not respond adequately in the grievance or grievance appeal to the claimant's questions. Again, it is clear that the claimant did not agree with the respondent's position. But I am not satisfied that the responses given to the claimant's questions during the grievance or grievance appeal breached the implied term of trust and confidence.

Predetermination

66. I am not satisfied on the evidence before me that the respondent informed the claimant at the beginning of the grievance appeal meeting that a decision had already been made regarding her appeal, for the reasons given above.

Stating agreement had been reached

67. I have outlined the relevant parts of the grievance outcome letter above. Read as a whole, it does not state that the claimant had agreed to work one day a week. It is very clear from the letter that *possible* arrangements had been discussed, and that the reference to an agreement that the claimant come to the office once a week was in the context of a *proposed* way forward.

Failure to reach a fair decision

68. The claimant's resignation letter states that the respondent's failure to reach a fair decision in her grievance appeal was the last straw. I am not satisfied on the evidence before me that the outcome of her grievance appeal was unfair. With respect to the contractual position regarding place of work, this letter put forward the respondent's position that whatever discussions had taken place with Michael Saunders before the variation of contract signed on 4 May 2021, they did not affect the contractual position. I have found that that is incorrect. But on this point the letter simply put forward an honestly held position, one which had been the respondent's consistent position since 21 June 2022. In respect of all issues other than place of work, the decision reached in the grievance appeal did not breach the implied term of trust and confidence. As I have said, what was said in their letter was not new so any breach of the implied term of trust and confidence in respect of place of work was not new. I now turn to the issue of whether the respondent's position in respect of place of work breached the implied term of trust and confidence.

Place of work and the implied term of trust and confidence

69. The respondent attempted to impose a unilateral change in respect of the claimant's place of work. Did this breach the implied term of trust and confidence?

70. It is important that, although I have decided that an oral agreement had been reached by the claimant with Mr Saunders that the claimant would come into the office only once a week, the respondent had no record of that and Mr Saunders was no longer employed by the respondent. The respondent was not attempting to renege on a written variation of contract, and had not had confirmation of the new arrangements from Mr Saunders. Further, Mr Ferguson demonstrated flexibility. Having asked the claimant to come into the office two days a week, he suggested that the claimant work in the office one day a week. Mr Ferguson suggested that this should be reviewed after three months, but by the time of the outcome of the flexible working appeal the requirement was simply that she come into the office once a week. The unilateral change was therefore to require the claimant to work in the office once a week rather than once a fortnight. The claimant was clearly able to come into the office once a week. She had childcare responsibilities and had supported a family member who had been ill. But by May 2022 the claimant's sons were 14 and 12 years old. In September 2022 she explained to the respondent for the first time that she had also been supporting a family member through difficulties with their health. But by that time, the family member had recently been able to return to work.

71. The respondent did not behave in a way that was calculated to destroy or seriously damage the trust and confidence between the claimant and the respondent. It had no record of the agreement reached, and made no such calculation. It is clear that the claimant did in fact cease to trust and have confidence in her employer. But the question is for me is an objective one. And taking account of the factors just outlined, the respondent did not behave in a way that was likely to *destroy* or *seriously damage* the trust and confidence between the claimant and the respondent.

72. Did the respondent have reasonable and proper cause for requiring the claimant to come into the office once a week? The claimant emphasised that there had been no suggestion that she had not worked effectively while she was working remotely, and there had been no complaints about her work. I accept that. However it is for the respondent and the claimant's line manager to consider whether her working in the office once a week may be advantages to the business. It said that given the claimant's seniority and experience it was vital that more junior members of the team learn from her experience. That is a reasonable and proper cause for requiring her to come into the office once a week.

Contractual term

The respondent breached the claimants contractual right to work at home except for one day a fortnight when, on 23 May 2022 Michael Ferguson, emailed the team - including the claimant - saying that he would like everyone in the office two days a week, and when he wrote to the claimant on 21 June 2022 saying that she was required to working the office one day a week.

Was the breach a fundamental one?

73. Contractual terms regarding place of work are important. However the difference between the parties was merely the difference between working in the office once a fortnight and once a week. The claimant was clearly able to come into the office once a week. By May 2022 the claimant's sons were 14 and 12 years old and by September 2022 the family member she had been supporting had recently been able to return to work. Taking account of all the circumstances, the breach was not fundamental.

Trigger for resignation

74. The respondent argued that the claimant did not resign in response to the breach, because the real reason for her resignation was that she was dissatisfied with not receiving her full pay for the entire period she was on sick leave. The question for me is whether the breach of contract was *a* reason for the claimant's resignation. Having heard the claimant's oral evidence – which made very clear her genuine sense of grievance, which continued to the hearing – I am satisfied that the breach of contract was *a* reason for her resignation. She resigned in response to the outcome of her grievance outcome appeal and this did, among other things, reiterate the respondent's position that she was required to work in the office once a week.

Affirmation

75. Did the claimant affirm the contract before resigning? Mr Ferguson asked the claimant to work in the office two days a week on 23 May 2022. The claimant challenged this the same day. On 28 June 2022 solicitors wrote on her behalf challenging this decision. On 7 October 2022, after the flexible working appeal, the claimant wrote to HR making clear that she would continue to work in the office only one day a fortnight. She was effectively working under protest. Although she did briefly comply with the one day in the office every week requirement, she did so only very briefly, going to the office on 23 February 2023 and starting to do so on 2 March

2023, before she had a panic attack. I do not think that that very brief compliance with the requirement amounts to affirmation of the contract. However she did not ultimately resign until 12 July 2023, over a year after Mr Ferguson's initial email. Further, she twice asked the respondent to consider exercising its discretion under the contract to pay her full pay while she was on sick leave, rather than the contractual minimum of statutory sick pay. In response to these requests, the respondent extended the period of sick leave in which full pay was paid by 10 days on 9 May 2023, and again on 7 July 2023. Taking account of the entire period in which she continued to work and to receive pay for her work (over nine months) or was on sick leave (four months) before she resigned, and of the fact that on two occasions she asked the respondent to exercise its discretion under the contract in respect of sick pay, I consider that the claimant chose to keep the contract alive even after the breach. It is notable that her solicitor's letter of 28 June 2022 expressly said that it would be open to her to resign and bring a case for constructive dismissal. She was aware of this possibility as early as 28 June 2022, but chose not to resign until 12 July 2023.

Employment Judge Andrew Jack

Date 27 January 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

29/01/2024

FOR EMPLOYMENT TRIBUNALS

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/