



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs Sharon Marray

**Respondent:** Grimsby Cleethorpes and Humer Region YMCA

**Heard at:** Nottingham by Cloud Video Platform ('CVP')

**On:** 5 October 2023

**Before:** Employment Judge Cansick

## Representation

Claimant: Miss E Helland, daughter of the claimant

Respondent: Ms M Martin, Counsel

# RESERVED JUDGMENT

The claimant's claim of constructive unfair dismissal is not well founded and is dismissed.

# REASONS

## Introduction

1. The claimant was employed by the respondent most recently as the Head of Finance and Information Systems. Her employment ended on 9 May 2023.
2. The claimant claims she was constructively dismissed as a result of being asked to return to working in the office, rather than from the home. This is considered to have breached the contract of employment, including the implied term of mutual trust and confidence.
3. The respondent asserts that the request and the way it was made did not breach the contract.
4. All parties appeared by CVP. The claimant was represented by her daughter, Miss E Helland. The claimant gave sworn evidence. The respondent was represented by Ms M Martin of Counsel. The respondent's sworn witness evidence was given by Ms Kate Conway, the respondent's CEO and Ms Samantha England, the respondent's Deputy CEO.

5. I also had access to an agreed bundle of documents which ran to 200 pages. I informed the parties that I would only consider documents referred to in evidence.

**Issues to be decided**

6. There was a discussion at the outset of the hearing about the relevant issues. The issues were:
- 8.1. *Did the respondent's request for the claimant to return to working in the office, rather than from home, breach the implied term of trust and confidence or any other term of the contract?*
  - 8.2. *If a breach of contract, was it a reason for the claimant's resignation?*
  - 8.3. *Did the claimant affirm the contract before resigning? Did the claimant's words or actions show that they chose to keep the contract alive even after the breach?*
  - 8.4. *If the claimant has been constructively dismissed, should any reductions to the award be applied?*
9. It was agreed that if it was found that the claimant was constructively dismissed then remedy would be dealt with at a separate hearing.

**Findings of fact**

10. The claimant began employment with the respondent on 12 June 2012 as a Finance Assistant. In 2014 she was promoted to her most recent role. The role was full time and included being part of the respondent's Senior Leadership Team ('SLT'). The claimant was the line manager of two members of staff.
11. In March 2020, the claimant began working from home due to Covid-19.
12. On 1 March 2021, the claimant made a statutory written request, pursuant to section 80F of the Employment Rights Act 1996, to work from home on a permanent basis. The request detailed that when the claimant had previously worked in the office she had to regularly work beyond her contracted hours which has resulted in her becoming stressed. Working from home had allowed her to work uninterrupted and therefore be more productive. She detailed she would still attend meetings (including leadership meetings) on site and attend for other matters essential to her role.
13. On 8 March 2021, the claimant met with the respondent's then CEO, Ms Debbie Cook, to discuss the request. Ms Kate Conway, who was at that time Head of People and Policy, also attended to take notes of the meeting.
14. By a letter from Ms Cook, dated 10 March 2021, the claimant was informed that her request to work permanently from home had been refused. The letter detailed that senior leaders needed to be on site so issues that arise can be addressed straight away. It was also stated that the claimant needed

to be present to provide significant pastoral support to those she line managed. It was considered, therefore, that the claimant being away from the office impacted on the respondent's organisational performance and quality. It was though detailed that the respondent accepted a 'blended approach' was helpful for members of the SLT returning to the office after Covid-19. It was stated members of the SLT might work 1-2 days a week at home.

15. In an email received by the respondent on 11 March 2021, the claimant appealed the decision to refuse her request to permanently work from home. The appeal detailed the the claimant considered she was always available to respond to questions quickly and efficiently 'by teams, face to face, email, or a phone call'. She also considered she could come to the office quickly for urgent staff meetings, living only 10 minutes away. The claimant further detailed that she was always available to the staff she line managed and that they spoke regularly. It was noted that she had provided pastoral support remotely for the year. It was not considered that working from home had negatively impacted on performance and quality since the performance of the whole finance team had improved under measures brought in for Covid-19.
16. On 11 March, the appellant attended a meeting with Mr Ray Oxby, the respondent's Vice Chair, where her appeal was considered. Ms Conway again attended in order to take notes.
17. In a letter from Mr Oxby, dated 19 March 2011, the claimant was informed that her appeal had been refused. Mr Oxby concluded:

*The requirement of my role withing the appeal process is to determine if due process has been followed as per the ACAS code of practice. After full consideration I can confirm that I believe that the process for handling your request has been appropriability followed. Debbie has made her decision, as per the letter of the 10<sup>th</sup> March 2021, based on a coherent business reason i.e. detrimental impact on quality and performance, as set out in the legislation.*

*Notwithstanding the above, I understand the original request was made following inconsistencies in communication relating to the future working arrangement of the senior leadership team. With this in mind, I will be recommending to Debbie, in my role as Vice Chair of YMCA Humber, that she discusses and gains feedback from the senior leadership team in the best way to achieve a blended approach to work locations.*

18. The claimant considered that the second paragraph above upheld her appeal. She detailed that this is why it suggested a blended approach. The respondent stated this was not the case and that the appeal was unsuccessful. I consider the wording in the letter is clear. Mr Oxby found the process fair and the appeal was dismissed. Suggestion of considering a blended approach was also mentioned in the initial refusal of the request on 10 March 2023. The blended approach was to allow some home working. It cannot be interpreted as agreement of the claimant's request to work permanently from home. I, therefore, consider the appeal was dismissed.

19. On 15 March 2021, the claimant made a formal grievance against the then CEO, Ms Cook. As the CEO left employment with the respondent, the grievance was not further pursued.
20. The claimant stated that not long after the appeal, Ms Cook in an SLT team meeting, in which Ms Conway and Ms Sam England were also present, advised her that she could now work permanently from home. The respondent does not accept that such a decision was made or communicated. Ms Conway stated in evidence that no such meeting took place.
21. I prefer the evidence of the respondent for the following reasons:
  - (i) The decision had recently been made to refuse the claimant's statutory request to permanently work from home. That decision had been upheld on appeal. On the evidence provided it is not logical that the respondent would then change their mind without any specific reason.
  - (ii) There is no written confirmation of such a meeting or a decision for the claimant to permanently work from home. I would have expected a decision that she could permanently work from home to be communicated in writing.
  - (iii) The claimant details that she was interviewed as part of her grievance against Ms Cook by an HR Consultant. She states in that interview she informed the Consultant that at the SLT a decision had been made for her to work permanently from home. However, such does not demonstrate the meeting took place only that the claimant reported it had.
  - (iv) That such a decision was made is also inconsistent with later action of the claimant. Nowhere in later correspondence from the respondent to the claimant is it stated that the claimant could permanently work from home or that such a decision was being reversed. Correspondence suggests claimant being asked to discuss returning to work in the office.
22. I, therefore, find the claimant was not told at an SLT meeting that she could work permanently from home.
23. In May 2022, the appraisal by Ms Conway, who had been appointed CEO in April 2022, stated that the claimant being based primarily from home had worked well. However, earlier in the appraisal it stated:

*Sharon's home-based work model has required her to recognise that whilst this allows her to focus on her role other team members and peers are regularly dealing with interruptions and day to day operation issues.*
24. On 6 February 2023, the claimant attended the office for a Finance Committee meeting. After the meeting Ms Conway informed the claimant that there was a need for her to return to work in the office. It was agreed they would discuss further the following week.
25. On 8 February 2023, the claimant met with Ms Conway off site. On this date the claimant asked what would happen if she refused to return to the office permanently. Ms Conway informed the claimant there was a business need for her to return and that if she chose not to do so she had the option to

resign. The claimant however, states she was informed by Ms Conway that if she did not return she would be dismissing herself. I prefer the evidence of the respondent. Ms Conway wrote notes after the meeting confirming what she stated. She detailed in evidence these were written straight after the meeting.

26. At the meeting the claimant suggested she could leave the SLT and work from home three days a week on the accounts. Ms Conway stated she did not have budget to bring in another senior manager. Ms Conway agreed to go away and consider other options.
27. On 9 February 2023, the claimant was signed off work for a month with anxiety/depression and sent a sick note from her doctor to the respondent.
28. On 10 February 2023, Ms Conway sent the claimant a letter acknowledging the sick note and summarising the informal discussions that had taken place that week. In that letter the reasons it was detailed why it was considered detrimental to the performance of the organisation if the claimant continued to work at home. The reasons were highlighted in the letter as follows:
  - (i) Additional tasks other members were having to perform in the absence of the claimant from the office. This was detailed to include scanning multiple documents to the claimant, repeating conversations and having to communicate through multiple email chains rather than face-to-face discussions.
  - (ii) The lack of visible leadership and pastoral support. It was highlighted that an employee who had joined in October 2022 was having to seek guidance from her peers rather than the claimant.
  - (iii) That the claimant's connection with the day to day organisation had eroded. 50% of substantive staff were detailed to have joined over the last two years, many of which do not have a relationship with the claimant. New members were stated to not be receiving guidance on financial related issues.
  - (iv) The claimant being away from day-to-day operations mention she was not inputting into strategic discussions.
  - (v) The claimant from working at home was unable to carry out shared leadership accountabilities including coaching and mentoring.
29. It was noted in the letter that the respondent wanted to discuss a phased and blended approach to the claimant returning to work in the office. A proposal was suggested that the claimant could first return to the office for three days with this being increased to four days later. The claimant was invited to a formal consultation meeting.
30. On the same day, after receiving the letter, the claimant sent an email to the respondent in which she resigned and gave three months' notice.
31. On 13 February 2023, by letter the respondent acknowledged receipt of the resignation letter, but requested they still have a formal meeting to explore options.
32. On 20 February 2023, a meeting took place between the claimant and Ms Conway. The meeting was off-site at the request of the claimant and an

independent note taker attended the meeting. At the meeting the claimant confirmed she did not wish to return to the office full-time and had resigned from her position. The claimant put forward a proposal where she would work part time for the respondent with the status and duties of her role reduced.

33. On 21 February 2023, Ms Conway wrote to the claimant informing her she had discussed the proposal with senior leadership but they did not consider that proposal would address the earlier highlighted issues. The resignation was accepted with a leave date of 9 May 2023.
34. On 8 March 2023, the claimant was signed off work for a further two months. The claimant did not return to work during the notice period.
35. The claimant's contract of employment was signed on 8 January 2014 and was for the role of Finance Assistant. It detailed that the claimant's employment in this position had begun on 12 June 2012. Regarding the location of work, it stated:

*Your work in this position will be based at the Management Office at St Aidan's Church, however your role will incorporate all of our sites and therefore you will be expected to travel to various locations as part of your responsibilities in consultation with your line manager based upon business requirement and the responsibilities of the role.*

36. There are two written updates to the terms and conditions of employment, dated 5 January 2022 and 2 November 2022. Neither of these make changes to the claimant's place of work. They are mainly to do with salary, hours of work and holiday. There were no other contracts or written updates of the terms and conditions of employment.

### Relevant law

37. An employee is entitled to treat themselves as constructively dismissed where they terminate their employment contract following the employer seriously breaching that contract in a way which goes to the root of the employment contract (*Western Excavating (ECC) Ltd v Sharp [1978] QB 761*).
38. The serious, or repudiatory, breach of contract may be to express provisions of the employment contract or to provisions which are implied into the contract by case law. All employment contracts contain a term that "*the employer shall 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 BCCI SA (in Liquidation) [1998] AC 20*, as amended by *Varma v North Cheshire Hospitals NHS Trust [2007] 7 WLUK 116*).
39. Whether or not there has been a breach to the implied term of trust and confidence is an objective question and the employer's intentions are irrelevant. If the employer commits conduct which is likely to destroy or seriously damage mutual trust or confidence, then it will be deemed to possess the subjective intention (*Leeds Dental Team Ltd v Rose [2014] ICR 94*) and the employee is likely to be able to accept that repudiatory breach

and terminate the employment contract (Morrow v Safeway Stores Plc [2002] IRLR 9).

40. The determination as to whether a breach is sufficiently serious as to constitute a repudiatory breach is an objective test, and it does not matter that the employer might genuinely believe a breach to not be repudiatory (Tullett Prebon Plc v BCG Brokers LP [2011] EWCA Civ 131). The overall repudiatory breach may be a single act or a collection of smaller breaches or a series of events which are not individually breaches but which amount to a breach when put together (Garner v Grange Furnishing [1977] IRLR 206).
41. To accept a repudiatory breach of contract and claim constructive dismissal, an employee must resign or treat the employment contract as having ended in response to the breach. It is sufficient for these purposes for the breach to have played a part in the decision to resign (Wright v North Ayrshire Council [2014] ICR 77). The tribunal is able to ascertain the true reason for the employee's resignation (Weathersfield Ltd v Sargent [1999] ICR 425).
42. When faced with a repudiatory breach of contract, an employee can choose to either accept the breach, which ends the contract, or affirm the contract and insist upon its further performance. Failure to resign or act in a way which treats the employment contract as ending risks the employee either affirming the contract or waiving a breach of the contract of employment. When considering whether a contract has been affirmed, the tribunal will look at all of the circumstances of the case (WE Cox Turner (International) Ltd v Crook [1981] ICR 823).
43. Employees should be careful when choosing to continue to work for a period if they intend to rely upon a repudiatory breach of contract in a constructive dismissal claim. In Quilter Private Client Advisers Ltd v Falconer [2020] EWHC 3294 (QB), Calver J said, at para 121:

*It is undoubtedly the case that if the employee decides to accept the repudiatory breach, he must do so unambiguously and with sufficient dispatch. If his purported acceptance is delayed, he runs the risk of a court finding that his action has not been sufficient to discharge the contract. However, in my judgment it is what happens during the delay which is the critical feature: provided the employee makes unambiguously clear his objection to what has been done by the employer, he is not necessarily to be taken to have affirmed the contract by giving a short period of notice, and continuing to work and draw pay for a limited period of time ... It all depends upon the facts of the particular case whether the employee has nonetheless unambiguously accepted the repudiation of the employer and with sufficient dispatch. The length and circumstances of the delay require to be examined in each case.*

## Conclusions

44. I remind myself that the burden of proof rests on the claimant to demonstrate that they have been constructively dismissed. I also remind myself that consideration of whether there has been a breach is through an objective person approach. I do not, therefore, consider the matter from either the eyes of the claimant or the respondent.

45. I do not accept there was agreement that the claimant could work permanently from home. Her statutory request to do so and subsequent appeal were refused by the respondent in March 2021. Further to this there is no mention of a change to the claimant's place of work in the written updates to the terms and conditions of employment in January and November 2022. There is also no correspondence from the respondent stating such was agreed. I, therefore, do not consider the request for her to return to working in the office breached the implied term of trust and confidence in the contract on the basis that it had been previously agreed she could permanently work from home.
46. It is though clear that the respondent allowed the claimant to work from home for a considerable amount of time. She began working from home in March 2020 and aside from the refusal of the statutory request, there is no recorded request of the respondent for her to return until February 2023. However, it would have been clear to the claimant that it was a temporary measure. This was reflected in the refusal of her statutory request, that there were no written changes to her term and conditions of employment and what was stated in the appraisal in May 2022. It was clearly an express term of the employment contract that the claimant would work at the office. The respondent explained in detail to the claimant (as stated in the 10 February 2023 letter) why there was a need for her to return to working in the office. I do not consider in the circumstances detailed the request for the claimant to return to working in the office breached the implied term of trust and confidence.
47. I have also considered if the way in which the claimant was asked to return to working in the office breached the implied term of trust and confidence. The respondent held two informal discussions/meetings with the claimant, one of which was off site, on 6 and 8 February 2023. It is clear from those meetings that the respondent wanted to find a solution. The 10 February 2023 letter made clear the reasons for the request and that a blended/phased approach was suggested. At that time the claimant was invited to begin formal discussions. The claimant resigned before such discussions took place. I do not consider the way the request was made for the claimant to return to work in the office in anyway breached the implied term. The respondent was clearly trying to find a solution and allow the claimant to input.
48. The claimant also argued that it has become a part of the contract that the she would work permanently from home as such had been expressly agreed by the respondent. For the same reasons detailed in paragraph 45 above I do not consider this was the case. As there was no such agreement there could not have been a contractual term for such and there was, therefore, no breach of the contract on that basis.
49. I have considered the claimant's case carefully, however, the matters complained about, when viewed objectively, were not a breach of the contract.



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**Employment Judge Cansick**

Date: 15 December 2023

JUDGMENT SENT TO THE PARTIES ON

...19 December 2023.....

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FOR THE TRIBUNAL OFFICE