



EMPLOYMENT TRIBUNALS

Claimant: Ms Lilian Cole
Respondent: Royal Mail Group Ltd
Heard at: East London Hearing Centre (by CVP)
On: 17 and 18 April 2024
Before: Employment Judge Volkmer

Representation

Claimant: Ms Matharu (Counsel)
Respondent: Mr Brown (Solicitor)

JUDGMENT having been sent to the parties on 9 May 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

REASONS

1. By a claim form presented on 6 November 2023 the Claimant made a complaint of constructive unfair dismissal. The Respondent resisted the Claim.
2. I heard oral evidence from the Claimant and, on behalf of the Respondent, Ms Amanda Palmer, Mr Noyeem Uddin, Mr Rao Gudimalla and Mr Andrew Smith.
3. I also considered the pages I was referred to in the Hearing Bundle of 339 paginated pages. Page references refer to Hearing Bundle pages. The document at page 146 had the second page missing which was provided separately by the Respondent.

Issues

4. The issues for the Tribunal to determine were discussed and agreed with the parties at the start of the hearing and are as follows.

Unfair Dismissal

1. *Was the Claimant dismissed? The Claimant alleges that she was constructively dismissed (s95(1)(c) ERA 1996). The Claimant alleges that the Respondents acted in fundamental breach of the implied term of mutual trust and confidence. She relies on the following alleged breaches.*
 - a. *the locker incident on 1 February 2022;*
 - b. *that the Claimant's grievance regarding the locker incident was not handled in a timely manner;*
 - c. *the issuing of an attendance warning on 7 October 2022;*
 - d. *the issuing of a conduct warning.*
2. *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.*
3. *Did the Claimant resign because of the breach? 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.*
4. *Did the Claimant delay before resigning and affirm the contract?*
5. *In the event that there was a constructive dismissal, was it otherwise fair within the meaning of s. 98 (4) of the Act?*
6. *Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason? (Polkey)*
7. *If the Claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce her compensatory award? By what proportion?*
5. Significant time was spent at the beginning of the hearing clarifying the issues with Ms Matharu, in particular to ask the Claimant to specify the alleged breaches of contract. After time had been spent confirming the alleged breaches, Ms Matharu was permitted further time to take instructions in order to ensure that all of the alleged breaches had been covered in the discussions. The alleged breaches listed above were confirmed (after taking instructions) as being the only ones relied on by the Claimant. Ms Matharu then sought to rely on further alleged breaches of contract at submissions stage. She was not permitted to do so on the basis that all of the evidence had been heard and the Respondent had not been given the opportunity to cross examine in relation to the new alleged breaches being raised. It was therefore not in the interests of justice to permit this change because there was significant prejudice to the Respondent in allowing such a last minute change.

Findings of Fact

6. The Claimant was employed by the Respondent as a member of post room staff from 9 October 1995 until 6 October 2023.
7. On 1 February 2022, Amanda Palmer (Plant Support) was given the task of clearing the lockers of four to five leavers. The reason for doing this was so that the lockers could be re-allocated either to new joiners or to existing staff members.
8. Ms Palmer had most of the keys but went to ask the Resourcing Unit for one of the keys. In error, she was given the Claimant's locker key. Ms Palmer passed the four or five keys to another colleague who cleared the lockers. As is common when people leave the business, various items had been left there. These items were taken out and placed in a black plastic bag, including the Claimant's belongings. The bag was put inside the resourcing office in case one of the individuals wanted their belongings back. The member of staff who had inadvertently given Ms Palmer the wrong key, later realised her mistake and informed Ms Palmer that she had been given the Claimant's key by mistake. The colleague who had emptied the locker tried to recollect which items had been in the Claimant's locker but could only identify the lunch bag, which he returned to her locker. This is based on Ms Palmer's evidence.
9. Later on 1 February 2022 the Claimant returned to work to find that her locker had been opened and part of the contents had been removed (disposable plates, spoons, personal letters, payslips, tea and other items). The Claimant immediately informed her line manager Eunice Aina who went with her to check the locker.
10. Ms Aina raised the issue with Noyeem Uddin who was at that time the acting Shift Manager. Mr Uddin spoke with security in case they had been involved. Both Ms Aina and Mr Uddin spoke to Ms Palmer who explained that the incorrect locker key had been given to her by the Resourcing Unit and therefore the incorrect locker was accessed which happened to be the Claimant's locker. Ms Palmer and the Claimant worked different shifts such that they were never working at the same time. As such, Ms Palmer asked for an apology to be passed on from her team to the Claimant. The Claimant was not offered the chance to retrieve her belongings. The Claimant's evidence was that the missing contents consisted of letters, food items and disposable plates and cutlery.
11. Mr Uddin explained to the Claimant that her locker had been mistakenly opened due to human error and apologised to her on behalf of the Respondent. The Claimant stated that she wished to escalate the matter to Rao Gudimilla (a Shift Manager for the Respondent).
12. On 9 February 2022 the Claimant went to see Mr Gudimilla in his office and raised with him that her locker had been opened and cleared. Mr Gudimilla said that he would look into it.
13. On 14 February 2022, the Claimant had not heard back from Mr Gudimilla so raised a grievance via the Employee Relations Case Management Team

and also contacted Speak Up (an internal method of raising concerns). A message stating "*Employee has a grievance regarding her locker being emptied and no value explication [sic] to way this has been done*" (page 70) was sent to Mr Gudimalla.

14. Following this, Mr Gudimalla spoke informally to the Claimant, he explained that her locker had been opened due to human error and apologised on behalf of the Respondent for the error that had taken place. Mr Gudimalla explained to the Claimant if any of her belongings in the locker were valuable he could speak to his superiors about compensation. The Claimant said that there was nothing of value in the locker. This finding is based on Mr Gudimalla's witness evidence.
15. On 3 March 2022 the Claimant went off sick with stress.
16. On 23 August 2022, the Claimant was sent an email asking for consent to refer her to Occupational Health. On 24 August 2022 the Claimant's trade union representative emailed in response stating "*if management would properly investigate [the Claimant's] grievance*" (page 115) that this would assist her return to work.
17. In August 2022 Mr Gudimalla received a notification from the ERCM Team that the Claimant was not satisfied with the outcome and requested that her grievance be re-opened and investigated. Mr Gudimalla again spoke informally to the Claimant soon after and explained what had happened, what had been done in terms of investigation and offered another apology in order to address her concerns. This finding is based on Mr Gudimalla's witness evidence.
18. The Claimant returned to work on 29 August 2022. She was then invited to a formal attendance review meeting which took place on 21 September 2022 (page 117). The Respondent's absence management policy sets out that the trigger for Attendance Review 1 is four absences or 14 days' absence in a 12 month period. At this point, the Claimant had 175 days' absence. Following this meeting, on 7 October 2022 the Claimant was issued with an Attendance Review 1 (page 122). This was upheld on appeal.
19. On 4 November 2022 an email was sent to Mr Gudimalla by the ERCM Team regarding the delay in coming back to the Claimant. He responded "*I have updated the notes on PCM few weeks ago. Lilian Cole line manager and Myself spoken to Lilian straight after she raised the concerns and explained what has happened and offered apology.*" (page 125).
20. On 11 January 2023, the Claimant emailed the ECRM Team asking whether she could go to the second stage as Mr Gudimalla had been ignoring her request for a full investigation (page 134). Mr Gudimalla responded to the Claimant's email on the same day (page 135) saying that he had completed his investigation by speaking to the relevant team and then had an informal meeting with the Claimant to explain the outcome. This email referred to the reason for the locker being open being related to ants and mouldy food in the Claimant's locker and referred to 6 pairs of bag cutting scissors being

found in the Claimant's locker. This information regarding the reason that the locker had been opened was incorrect.

21. The Claimant's trade union representative approached Mr Gudimalla for a meeting to discuss the grievance. The meeting took place on 26 January 2023 with the Claimant, her trade union representative and Mr Gudimalla in attendance. It was alleged by Mr Gudimalla that, in this meeting, the Claimant had exhibited inappropriate and intimidating behaviour towards him, called him a liar and refused a reasonable request to leave the meeting room for a 24 hour cooling off period.
22. A disciplinary process was instigated in relation to these three allegations. Umer Khan, a Manager, conducted a fact finding investigation. He interviewed the Claimant, Mr Gudimalla and the Claimant's trade union representative. The Claimant denied that she had behaved inappropriately, and said she referred to the allegation of having rotten fruit in her locker as being a lie, but had not called Mr Gudimalla a liar.
23. When the Claimant's trade union representative was interviewed, he stated that the Claimant may have been agitated on Mr Gudimalla's intervention. The trade union representative considered that the Claimant's conduct had been inappropriate but not aggressive. The trade union representative confirmed that she had refused to leave the room after being asked to do so. The trade union representative referred to the Claimant stating "that's a lie" and referring to lying.
24. This meant that effectively two witnesses, Mr Gudimalla and the trade union representative were largely in agreement in relation to what had happened during the meeting. Both witnesses stated that the Claimant had behaved inappropriately and had refused to leave the room after being asked to do so.
25. The Claimant was then invited to a formal conduct meeting (page 148) and issued with a 1 year serious warning on 14 February 2023 (page 151). This was upheld on appeal (page 210).
26. On 29 May 2023, the Claimant appealed against the outcome of the grievance lodged on 14 February 2022 (page 168). Andrew Smith (Plant Manager) was assigned as the appeal manager.
27. The Claimant was off sick from June 2023 until the date of her departure from the Respondent.
28. The Claimant was invited to an appeal meeting which took place on 7 July 2023 (page 181). Mr Smith also interviewed Ms Palmer (page 192), Mr Gudimalla (p195), and the Claimant's trade union representative (page 198). Ms Aina could not be interviewed as she had left the business, nor could the individual who had given Ms Palmer the wrong key as she had also left the business.
29. On 10 July 2023 Mr Smith issued the appeal outcome (page 200). Mr Smith partially upheld the grievance making clear that the Claimant's locker should

not have been opened, but that it was done accidentally and those involved were sorry.

30. In oral evidence Mr Smith stated that his view in deciding the appeal had been that Mr Gudimalla had dealt with the grievance informally, which was not a breach of the grievance policy. However, he himself might have been inclined to put more in writing.
31. On 31 July 2023 the Claimant sought to appeal Mr Smith's outcome (page 215) but was informed on 1 August 2023 that she had reached the last stage of the appeal process (page 218).
32. On 29 September 2023 the Claimant resigned on notice, which meant that her employment would end on 6 October 2023. The resignation letter (page 219) referred to the following:
 - a. the delay in considering her grievance;
 - b. the 1 year serious conduct warning, which she considered unwarranted;
 - c. the grievance outcome being that the opening of her locker was accidental and no malice was involved in circumstances where her personal space had been eroded;
 - d. that Mr Gudimalla had not responded when the locker incident had been raised with him informally;
 - e. that Ms Palmer had not been interviewed until 10 July 2023 during the appeal;
 - f. that no support was provided for the Claimant when she came back after sick leave; and
 - g. that she felt that she was left with no choice but to resign.

Constructive Dismissal: The Law

33. Under section 95(1)(c) of ERA 1996, an employee is dismissed if they terminate the contract under which they are employed (with or without notice) in circumstances in which they are entitled to terminate it without notice by reason of the employer's conduct. This is often referred to as a "constructive dismissal".
34. If the claimant's resignation can be construed to be a dismissal then the issue of the fairness or otherwise of that dismissal is governed by section 98 (4) of ERA 1996 which provides "... the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".
35. The leading authority in relation to constructive dismissal and the applicable test for a claim of constructive unfair dismissal was provided by Lord Denning MR in *Western Excavating (ECC) Limited v Sharp [1978] IRLR 27*: "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 his employer's conduct. He is constructively dismissed. The employee is entitled in these 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 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."

36. The Tribunal must therefore establish that there is a relevant contractual term and decide if it has been breached. If there has been a breach of contract, the question is then whether the breach is fundamental, in other words whether it repudiated the whole contract. In Tullett Prebon PLC and Ors v BGC Brokers LP and Ors Maurice Kay LJ endorsed the following legal test at paragraph 20: "... whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."
37. As set out in in Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) 1997 ICR 606, HL it is an implied term of any contract of employment 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. This is known as the implied term of trust and confidence. The test of whether there has been a breach of the implied term of trust and confidence is objective, and any breach of it will amount to a fundamental breach. That is because the essence of the breach of this implied term is that it is calculated or likely to destroy or seriously damage the relationship.
38. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a 'last straw' incident even though that incident by itself does not amount to a breach of contract (Omilaju v Waltham Forest London Borough Council [2004] EWCA Civ 1493).
39. If a fundamental breach of contract has been established, the employee may accept the breach and resign, or affirm the contract. If the employee resigns, in order to amount to constructive dismissal, such resignation must be caused by the breach of contract in question.
40. Jones v F Sirl and Son (Furnishers) Ltd 1997 IRLR 493, EAT, in order to decide whether an employee has left in consequence of fundamental breach, the tribunal must look to see whether the employer's repudiatory breach was the effective cause of the resignation. There may have been concurrent causes operating on the mind of an employee whose employer had committed fundamental breaches of contract (including, in this case the

offer of an alternative job). Where there was more than one cause operating on the mind of an employee it is the task of the tribunal to determine whether the employer's actions were the effective cause of the resignation.

41. The Court of Appeal in *Meikle v Nottinghamshire County Council 2005 ICR 1, CA* made clear that the crucial question is whether the repudiatory breach “played a part in the dismissal” and was “an” effective cause of resignation, rather than being “the” effective cause. It need not be the predominant, principal, major or main cause for the resignation.

Constructive Dismissal: Applying the Law to the Facts

42. The test for constructive dismissal is an objective rather than a subjective test. Looking at all the circumstances objectively, from the perspective of a reasonable person in the position of the Claimant. In relation to an alleged breach of the implied term of trust and confidence, I must consider:
- a. was there ‘reasonable and proper cause’ for the conduct; and
 - b. if not, was the conduct ‘calculated or likely to destroy or seriously damage trust and confidence’?
43. First taking each alleged breach of the implied term of trust and confidence individually.

The locker incident on 1 February 2022.

44. I have made a finding that the Claimant’s locker was opened in error on 1 February 2022. The relevant individuals did not know or target the Claimant, but simply mixed up some keys. This was a simple human error for which Mr Uddin and Mr Gudimalla had apologised to the Claimant soon afterwards.
45. There was no reasonable and proper cause for this act, it was done in error. However, this conduct cannot be characterised as conduct calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent. I accept the Claimant’s evidence that she was deeply upset by this. However, from the perspective of a reasonable person in the position of the Claimant, this is not an act that can be described as conduct that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and Respondent. The conduct simply is not serious enough to do so.

The Claimant’s grievance regarding the locker incident was not handled in a timely manner

46. In relation to the allegation that Claimant’s grievance regarding the locker incident was not handled in a timely manner. This has not been upheld factually. In my finding, this was handled in a timely manner, Mr Gudimalla dealt with it by speaking informally to the Claimant, he explained that this had happened due to human error, apologised on behalf of the Respondent for the error that had taken place. Mr Gudimalla explained to the Claimant if any of her belongings in the locker were valuables he could speak to his

superiors about compensation. As such, the allegation does not succeed factually.

47. I do go on to make the following comments. The Claimant wished the matter to have been dealt with more formally, but in the appeal findings, the approach taken by Mr Gudimalla to deal with it less formally was found by Mr Smith not to be in breach of the Respondent's policy. The alleged breach of the implied term of trust and confidence here related to delay rather than formality of the process in any case. The Claimant was not satisfied with the outcome and there were further emails and discussions on occasions when this was raised. In my finding the Respondent at each point sought to explain the error which had taken place and to apologise to the Claimant. There does appear to have been some degree of miscommunication between the individuals involved with Mr Gudimalla believing that the process had been completed, albeit informally whereas the Claimant believing it to be ongoing. No criticism has been made of the speed of the appeal stage with Mr Smith.
48. Whilst there could certainly have been some improvements in the way that the Claimant's complaint was handled, I consider that there was reasonable and proper cause for this. Mr Gudimalla believed that he had dealt with the Claimant's grievance by doing so informally. I accept the Claimant's evidence that she was upset by this. However, the Claimant did not appeal until 29 May 2023, over a year after submitting the original grievance. The Respondent acted quickly and thoroughly when the Claimant did so. From the perspective of a reasonable person in the position of the Claimant, manner in which her grievance was handled (in a timely, albeit informal fashion) was not an act that can be described as conduct that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and Respondent. The conduct simply is not serious enough to go to the heart of the relationship of trust and confidence.

The issuing of an attendance warning on 7 October 2022

49. In relation the issuing of an attendance warning on 7 October 2022. The Claimant had 175 days absence, which far exceeded the trigger point of 14 days. I consider it was reasonable to issue a stage 1 warning in the circumstances. This was simply the first stage of an absence management process designed to be applied to all absences, regardless of the reasons underlying the absence. In a business like the Respondent's, with many employees, a formal process for dealing with absence is reasonable and necessary for the appropriate management of employees. Therefore, I find that the Respondent had reasonable and proper cause for the conduct. From the perspective of a reasonable person in the position of the Claimant, this is not an act that can be described as conduct that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and Respondent. This is simply the reasonable implementation of an absence management policy.

The issuing of a conduct warning on 14 February 2023

50. In relation to the issuing of a conduct warning on 14 February 2023. In circumstances where a disciplinary investigation and process took place, it

was reasonable, based on the two individuals present at the meeting both stating that they considered that the Claimant had behaved inappropriately to make a decision that there should be a conduct warning. This is particularly in circumstances where one of the two unfavourable witnesses was the Claimant's own trade union representative. Therefore, I find that the Respondent had reasonable and proper cause for the conduct.

51. Any employer who proposes to discipline an employee for misconduct is doing an act which is capable of seriously damaging or destroying the relationship of trust and confidence between employer and employee. However, it is clear that that employer will not be in breach of the term of trust and confidence if they have reasonable and proper cause taking the disciplinary action. Here a due process has been followed and this is simply the reasonable outcome of a disciplinary investigation and process.

Cumulative Breach

52. Now I must decide whether the alleged breaches can be considered to cumulatively be considered to be a breach of the implied duty of trust and confidence.
53. Only the opening of the locker had no reasonable and proper cause, but I found that not to be calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and Respondent. In relation to all other acts, the Respondent did have such reasonable and proper cause.
54. Even taken all together, these acts together do not accumulate into a fundamental breach of contract. Whilst it is not a pre-requisite for last-straw cases that the employer's acts should be unreasonable, it is material here that the Respondent has had reasonable and proper cause for the majority of acts, and the act of mistakenly opening the Claimant's locker was, objectively, simply not serious enough to go to the heart of the relationship.
55. As such, in my finding, there has been no fundamental breach of contract and therefore, no constructive dismissal.
56. I dismiss the claim.

**Employment Judge Volkmer
Dated: 27 May 2024**