EMPLOYMENT TRIBUNALS

Claimant: **Mrs A Wainwright**

Respondent: **Cennox Plc**

Heard at: **East London Employment Tribunal**

On: **14 – 17 May 2024**

Before: **Employment Judge C Lewis**
Members: **Ms M Legg**
Ms J Isherwood

Representation
Claimant: Ms G Cullen
Respondent: Ms R White

JUDGMENT

1. **The Claimant was constructively unfairly dismissed.**

2. **The Claimant's dismissal was a discriminatory unfair dismissal.**

3. **The Claimant was wrongfully dismissed in breach of contract.**

WRITTEN REASONS

Provided at the Request of the Respondent made at the hearing on 17 May 2024, reasons having been given orally at the hearing

1. The following issues were to be decided by this Tribunal after remittal by the EAT following an appeal against the decision of the Employment Tribunal consisting of Employment Judge Burgher and members Mrs A Berry and Ms S Harwood:

   the reason for the Claimant's resignation; whether there was a constructive discriminatory unfair dismissal; constructive unfair dismissal and wrongful dismissal.

2. We are bound by the Employment Tribunal findings of fact at paras 36 to 126 and conclusions at paras 149 to 182 and 204 to 211 which were helpfully identified by the EAT in their Judgment.

3. Bearing those findings in mind we had to make our own findings of fact in respect of whether there had been a constructive unfair dismissal and we had to consider a set of issues which were identified at a preliminary hearing before Employment Judge Massarella and sent to the parties on 7 December 2023. Both parties were in agreement that the relevant issues for us were those contained in that List of Issues.

4. There is reference to affirmation in the List of Issues and in submissions. It was agreed that we were technically looking at whether there had been a waving of a breach and affirmation of the contract in that context and that is therefore what we have considered.

5. The starting point in terms of the factual findings are in relation to what was in the Claimant's mind at the time of her resignation and what was the cause or, if more than one, causes, of her resignation.

6. The Claimant's resignation letter was at page 388-389 in the bundle of documents and both Counsel referred to this letter and relied on this as evidence of what was in the Claimant's mind at the time. It was suggested to the Claimant in cross examination that it would be normal to expect someone to put first in the letter that which was most important to them and uppermost in their mind. The Claimant agreed with that proposition.

7. The Claimant's Counsel set out in her written submissions the same proposition and pointed to the matters that were set out in the letter.

8. Having heard from the Claimant we accept that the resignation letter was an accurate reflection of what was in her mind at the time. We note that the first three matters that were identified by her were, firstly that during her sickness absence in November 2018, she learned that Shelley Cawthorne had been given her job, she queried this but was assured this would not affect her role on her return; secondly in June 2019 it became clear that a restructure had taken place and that Shelley was doing her job, the company said it would need to see where she fitted in; thirdly she was assured that her role was unchanged but when she returned to work she did not return to her existing role and several key responsibilities were taken away from her, she stated she was offered a role that was a demotion and regulatory non-compliant.

9. We note that the previous tribunal found that the Claimant was assured her role was unchanged and this was held by that tribunal to be discrimination, but it did not find that she was demoted and responsibilities taken away.

10. We have found that the first matter raised is reference to the events that formed the basis of the findings of the section 15 Equality Act 2010 discrimination made by the earlier tribunal; we find that this did form part of the Claimant's decision-making process when she decided to resign and notably was the first thing that she raised in her resignation letter.

11. In relation to the second matter referred to in the letter, that a restructure that had taken place, the Claimant described feeling ill at ease and found that she had been misled about what had happened in her absence. This was also a finding of discrimination contrary to s15 discrimination by the previous tribunal. The Claimant had been misled by Mr Steven Garrod and Ms Jennifer Spencer-Lee who knew they had offered the role of Head of Installations to Ms Cawthorne on a permanent basis in November 2018. The Claimant relates this treatment to her cancer diagnosis and we have been referred to the findings of the previous tribunal which upheld S15 discrimination.

12. We found that both of these matters were central to the reasons for the Claimant resigning and at the very least, part of the reason for the Claimant's decision to resign.

13. We are satisfied that these were in her mind at the time of her resignation and were the primary factors, and therefore at least an effective cause or a material influence on her decision. We note that she also relied on other matters in her resignation letter and not all of those were found to be discrimination. We have reminded ourselves of the guidance in *Williams,* and that does not take away from the fact that the discriminatory action formed part of the reason for her resignation.

14. We then went on to consider whether they amounted to repudiatory breaches and we find that they were repudiatory breaches for the following reasons. The Claimant believed she had been lied to and then evidence came to her attention on 30 August 2019 that Shelley Cawthorne had in fact been permanently appointed as Head of Installations in November 2018. The Claimant therefore knew at the time of her resignation that she had indeed been lied to.

15. We were referred to a number of cases including, *Malik v BCCI* and *Rawlinson v Brightside Group Ltd*. We are satisfied that being lied to, even if it was in a clumsy and well-meaning way, is likely to damage the implied term of trust and confidence and we note the earlier Tribunal's findings that the conduct of the Respondent in this regard was not justified. We are satisfied therefore that even though it was well intentioned the Respondent did not establish a reasonable and proper cause for its conduct.

16. We find that this conduct meets the threshold of being conduct which goes to the root of the contract and amounts to a breach of the implied term of mutual trust and confidence.

17. The question of the last straw referred to by Claimant was canvassed before us by the parties. The last straw referred to was in respect of the delay to the grievance appeal meeting and the previous tribunal made findings that the delay was not unreasonable or conduct that was open to criticism. We accept the submission that the Claimant's reference to this in her resignation letter was not in the legal sense but rather in a lay sense. We bore in mind the guidance in *Omilaju v Waltham Forest London Borough Council* in which the EAT reminded us that this was not the whole answer.

A last straw may be relatively insignificant but must contribute something to the breach.

18. Having heard from the Claimant we are satisfied that what she had in her mind was in part her inability to trust or believe in what she was being told by Ms Spencer-Lee about the reasons for the delay to the Grievance Appeal. We find this to be consistent with her trust and confidence had been so damaged that she could no longer be expected to be bound by her contract. We find that her explanation that she was unable to accept what was being told to her was another factor in her decision to resign. It was not an overwhelming reason but was simply another factor that added something to the previous conduct.

19. We then considered the question of affirmation, having already found that the acts of discrimination relied on were capable of being fundamental repudiatory breaches. We went on to consider whether those breaches were waived or there was affirmation of the contract by the Claimant.

20. The Respondent pointed to the fact that the Claimant was engaged in discussions and negotiations around how the new split of the roles of Head of Installations would work going forward as being affirmation and also the fact that she carried on working and lodged a grievance. We do not find that engaging in the discussions about the role and the split of work was affirmation in respect of the breach relied on. We have found that what caused the Claimant to resign was substantially her feeling of being misled in those discussions. We find it was not an act of affirmation for the Claimant to seek to give the Respondent the opportunity to clarify matters and if necessary, to put them right. We do not find that the Claimant waived the breaches by entering into those discussions and by raising the grievance, setting out exactly what it was that she found to be repudiatory conduct. We are satisfied that she made clear that she objected to the conduct and we do not find that she affirmed the contract.

21. We have found that the breaches identified above did contribute to the Claimant's resignation which amounted to constructive unfair dismissal on discriminatory grounds.

22. In terms of answering the questions that were identified first in the List of Issues we set out our conclusions below:

- Taken together the acts of discrimination (as found by the Tribunal in May 2021 and set out in the List of Issues) amounted to a repudiatory breach of contract. We did not go as far as saying any one act breached the implied term of trust and confidence but taken together they did.

- The Claimant did not affirm the contract after the repudiatory breach of contract by the Respondent.

- The repudiatory breaches of contract materially contributed or influenced the Claimant's decision to resign in that they formed part of the reason for the Claimant's decision to resign.

- The Respondent did not put forward a potentially fair reason for the Claimant's dismissal and we found that there was a discriminatory, unfair dismissal.

23. We also considered separately the question of ordinary unfair dismissal. The same actions of the Respondent were relied on and we find that the conduct of the Respondent in this case, in misleading the Claimant in the way they did, was a breach of the implied term of mutual trust and confidence. We find for the Claimant in the constructive unfair dismissal, for the reasons already given in respect of the discriminatory conduct.

24. It therefore also follows that the dismissal was a wrongful dismissal.

REMEDY

Injury to feelings

25. We are to consider the question of injury to feelings and reconsider the injury to feelings that arise from the original findings of section 15 discrimination.

26. We note the Claimant's evidence at paragraph 42 of the Supplemental Statement that she had felt insecure as a result of feeling that she was being misled, and that by September 2019 she described feeling traumatised and broken. We find that the Claimant felt traumatised and broken as a result of discovering on 30 August 2019 that she had indeed been lied to, which was found to have been an act of discrimination. At that time the Claimant had been through cancer treatment and was recovering, although she was on continuing medication in respect of the chances of recurrence. She had been well enough to return to work and had been described as a fighter. We are satisfied on the evidence before us that it was the acts of discrimination which caused the Claimant's mental health to break down as it did in September and October 2019.

27. We had regard to the Counsellor's report [page 846 of the bundle] dated 16 June 2020 based on October 2019 counselling sessions. The counsellor noted that the Claimant was not, as she might otherwise have expected of a cancer patient, focused on the cancer diagnosis and its effects but rather on what had happened at work and her treatment at work and the link between that and absence due to her cancer. We accept that what had happened at work was identified as the focus of her feelings of distress and upset. This is consistent with the other evidence we have seen, for instance the GP notes and referrals to counselling, mental health community team and also social prescribing, which are also consistent with the Claimant's evidence that it was the conduct of the Respondent that led to her breakdown and serious mental health issues including suicidal thoughts. She was described as being at risk of suicide on at least two occasions in the notes of those she saw seeking support. She was diagnosed with severe depression and anxiety and completed three rounds of talking therapy and has been continuously prescribed antidepressant medication since October 2019.

28. We have had regard to the effect on the Claimant when assessing the level of any injury to feelings award and have reviewed the Vento guidance and also the Judicial College guidance on awards for Personal Injury as a benchmark. We took into account the ability of the Claimant to cope with everyday life, effect on her relationships with family and friends and others, the extent to which treatment has been successful and the evidence we have on future vulnerability and prognosis. We note that the Claimant has sought ongoing medical help and has received three rounds of CBT and talking therapy and is about to embark on a further round of acceptance therapy. The Claimant has not yet made a full recovery, almost five years after leaving the Respondent. We have the Claimant's evidence in respect of the very serious detrimental impact on her ability to cope with life and impact on her family. We note that there is reference to the effects of the ongoing litigation and lack of resolution in the litigation which is likely to prolong the effects or to impede a full recovery and we bear in mind that once litigation is resolved, it is likely that the prospects for the Claimant's recovery improves significantly. At this juncture the Claimant has not yet recovered to the level that she was before the acts of discrimination.

29. Doing the best that we can on the information available to us, we are satisfied that the effect on the Claimant is such that it falls into the upper Vento band. We looked at the bands that were applicable in 2019 and the range for the top band was £26,300-£44,000. We found the level of injury to the Claimant to be consistent with moderate to severe psychiatric damage in the Judicial College guidelines. We are satisfied that an award at the upper end of the top Vento band is appropriate in this case. As there is no separate claim for personal injury we take into account the injury overall and find it appropriate to award £40,000. We were asked to make a separate award for aggravated damages to reflect amongst other things that there has been no apology. We have not made a separate award for aggravated damages but have taken into account the lack of an apology and the effect of that on the Claimant's injured feelings in considering the level of award. Taking all these factors into account, overall we are satisfied that £40,000 is the appropriate award for injury to feelings in this case.

Financial loss

30. In this case we have not yet made any award in respect of financial losses. We have a number of questions about financial losses that might assist the parties in narrowing down of the issues.

Adjustment for failure to follow the ACAS Code

31. We considered the question of an ACAS uplift or reduction and we looked at the matters relied on by the Claimant in support of the uplift, however we do not find that those amount to breaches of the ACAS code. The unimpeached findings of the earlier Employment Tribunal judgment at paragraph 179 and 180 were that the appeal process was dealt with appropriately, that there was identification of an appropriate investigator and once appointed, Mr Alexander suffered a subsequent illness where he was

hospitalised and there was no unreasonable delay or inadequacies in the handling of the Claimant's grievance and appeal. We note that the Claimant specifically referred to the involvement of Ms Spencer-Lee in the grievance process as being inappropriate, being a person named in the Claimant's grievance itself. Ms Spencer-Lee's role in the grievance was limited to that of note-taker, she was not a decision-maker. Although we can understand the Claimant's concern that she might be at the hearing, she was a note taker and was there to make decisions on the investigation or outcome. We bear in mind the findings of the previous tribunal by which we are bound and are satisfied that Ms Spencer-Lee's limited involvement does not amount to a breach of the Code. We make no award in respect of an ACAS uplift.

32. The Respondent suggested there should be an ACAS reduction as the Claimant did not attend the Grievance Appeal hearing. We are satisfied that by that point in time the Claimant was very unwell. She told us the reason she was unable to attend the appeal hearing was because she was attending a counselling session and referred to the content of the counsellor's report. The Claimant has submitted a GP Fit note to say she was off work with stress; we find that that although not giving the full information, it was accurate and related to the events at work. We also accept the uncontested evidence of the Claimant that she sent in a full written statement for the appeal. We do not find that there was an unreasonable failure by the Claimant to attend the appeal hearing and we make no ACAS reduction.

Provisional view on financial losses

33. Both parties invited us to give an indication or provisional view on financial losses at this hearing. Having been invited to do so we agreed to give the parties our provisional view in order to assist the parties in narrowing down as far as possible the remaining issues for determination at a further remedies hearing.

34. Our provisional view is that there is unlikely to be an award for lifelong loss.

35. We also find that had the Claimant been unsuccessful in being offered the Director role in circumstances when she was fit and well and not an injured person, she would not have simply left her employment without securing somewhere else to go with a similar salary.

36. The Claimant told us that she currently earns in the region of £20,000 per year, our view is that this figure is likely to increase over time to a point where her original income is replaced.

37. We would like to her further submissions and possibly further evidence on financial losses.

38. We invited the parties to address us at the next hearing on the likely duration of the financial loss, the effect of tapering, and how long it would take for the Claimant's income to be restored.

39. A further remedy hearing was listed on 18 June 2024 and case management orders were made in preparation for the hearing on 18 June 2024.

Employment Judge C Lewis
Dated: 31 July 2024