



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100367/2024

Held at Inverness on 9 & 10 May 2024

Employment Judge N M Hosie

Miss K Tokarczyk

**Claimant
In Person**

Aquascot Ltd

**Respondent
Represented by,
Ms F Gorry,
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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

REASONS

1. Miss Tokarczyk claimed that she was constructively and unfairly dismissed by the respondent Company ("Aquascot"). Her claim was denied in its entirety by Aquascot.

The evidence

2. I heard evidence from MsTokarczyk and on her behalf from Sandra Kennedy, one of her work colleagues.

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3. On behalf of Aquascot I heard evidence from Anthony (Tony) Oxford, Head of Finance.

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4. A Joint Bundle of documentary productions was also submitted ("P"); along with a "Cast List and Chronology", which is referred to for its terms.

The Facts

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5. Having heard the evidence and considered the documentary productions, I was able to make the following findings in fact relative to the issues with which I was concerned. Helpfully, the parties had submitted a "Statement of Agreed Facts" on the basis of which, I make the following findings in fact.

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6. The respondent is a seafood processor based in Alness. The respondent has two production facilities based at Fyrish Way, Alness, IV17 0PJ, and 1 Averaon Way, Alness, IV17 0PF and another building which consists of office accommodation and a packaging warehouse based at Torridon, Fyrish Way, Alness, IV17 0PJ. The respondent employs approximately 190 employees in total.

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7. The respondent has an HR team which consists of one Full Time HR Advisor, one Part-time HR Advisor and one Full Time HR Assistant.

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8. The claimant commenced work with the respondent on 30 January 2013.

9. She was employed as an Accounting Technician and her place of work was the respondent's site at 1 Averaon Way. Alness, IV17 0PF.

10. Prior to her resignation, the claimant worked in the respondent's Finance Department with her colleagues Sandra Kennedy, Finance Officer and David Watssman, Standard Cost Technician. From 12 December 2016 to 3 February 2023, the team were managed by Charlene Cruickshank, Financial
5 Controller. Charlene Cruickshank left on 03 February 2023. Her replacement, Susannah Wingent, Finance Manager, commenced employment on 27 February 2023 and left, by reason of her resignation, on 26 May 2023. A copy of Susannah Wingent's resignation letter is included in the bundle at page 59 and a copy of her exit interview is included in the bundle at pages
10 60-61. Craig Moffat (Consultant) became Acting Head of Finance on 03 July 2023, and was responsible for the Finance Team, with a line lead role until the position was filled by Naeem Sattar on or around 10th July 2023. Naeem Sattar was engaged by the respondent on a consultancy basis as Finance Controller and reported into Craig Moffat until the Head of Finance position
15 was filled by Anthony Oxford.
11. Anthony Oxford, Head of Finance commenced employment with the respondent in September 2023. He took over management responsibility for the Finance Department with Naeem Sattar reporting directly to Anthony.
20 Thereafter, the team consisted of the claimant, Sandra Kennedy and David Watssman and they reported to Naeem Sattar until Naeem Sattar left the business in November 2023.
12. The claimant's hours of work were 37.5 hours per week, between 8.30am and
25 5pm, Monday to Friday.
13. The claimant's annual salary was £29,200. Her monthly gross pay was £2,433.33 and her monthly net pay was £1,927. She was a member of the respondent's pension scheme. She received the following additional benefits:
30 Death in Service benefit and 50% of Highlife Membership.
14. On 4 September 2023, the claimant attended a Teams meeting with Craig Moffat.

15. On 7 September 2023, the claimant attended a meeting with John Housego and Sandra Kennedy.

Claimant's Grievance

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16. On Thursday 5 October 2023 the claimant wrote to Anne Allen (email included in the bundle pages 75 to 76), former Head of HR for the respondent to confirm she wished to raise a formal grievance against Naeem Sattar. The claimant sent Anne Allen various documents in support of her grievance.
- 10 These are included in the bundle at pages 77-91.

Naeem Sattar's Complaint

17. Naeem Sattar, Finance Controller, submitted an "official complaint" against Sandra Kennedy and the claimant dated 5 October 2023. A copy of the complaint is included in the bundle at pages 92 to 94. Naeem Sattar sent Anne Allen various documents in support of his complaint. These are included in the bundle at pages 95-129.
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18. Anthony Oxford, Head of Finance was asked by the respondent to investigate the claimant's grievance and the complaint submitted by Naeem Sattar.
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19. The claimant attended a grievance hearing on 17 October 2023. A copy of the minutes is included in the bundle at pages 189-207.
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20. Anthony Oxford also held investigation meetings with the following individuals on the following dates:
- a. Craig Moffat, Acting Head of Finance (Consultant), on 11 October 2023 (copy minutes of meeting included in bundle at pages 134-143);
- 30 b. John Housego, Managing Director, on 12 October 2023 (copy minutes of meeting included in bundle at pages 144-151);

- c. Naeem Sattar, Finance Controller (Consultant) on 12 October 2023 (copy minutes of meeting included in bundle at pages 152-168 and 234-239);
- d. Patrycja Cisewska, H & S Advisor, on 12 October 2023 (copy minutes of meeting included in bundle at pages 169-170);
- 5 e. David Watssman, Standard Cost Technician, on 16 October 2023 (copy minutes of meeting included in bundle at pages 172-188 and 241-245); and
- f. Sandra Kennedy, Finance Officer, on 18 October 2023 (copy minutes of meeting included in bundle at pages 209-227).

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- 21. In the afternoon immediately after the grievance meeting, the claimant informed Anthony Oxford that she wished to resign from her employment. The claimant sent a resignation letter to the respondent dated 17 October 2023. A copy of the letter is included at page 208 of the bundle. In her letter,
15 she gave a month's notice and the effective date of termination of her employment was 17 November 2023.

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- 22. An exit interview was held with the claimant on 14 November 2023. A copy of the notes of that meeting is included in the bundle at pages 251-252.
- 23. The respondent sent a grievance outcome letter to the claimant dated 17 November 2023. A copy of the outcome letter is included in the bundle at pages 253-257,
- 25 24. The claimant wrote to the respondent appealing the grievance outcome on 17 November 2023. A copy of the email she sent is included in the bundle at pages 258-261.
- 25. The claimant was invited to attend an Appeal Hearing by letter dated 7
30 December 2023. A copy of the invite letter is included in the bundle at page 271.

26. David Chapman, Manufacturing Director was tasked by the respondent to hear the claimant's Grievance Appeal.
27. The claimant attended a Grievance Appeal Hearing on 8 December 2023. A
5 copy of the minutes of the Appeal Hearing is included in the bundle at pages 272-281.
28. David Chapman also held investigation meetings with the following individuals on the following dates:
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- a. John Housego on 14 December 2023 (copy minutes of meeting included in bundle at pages 282-283;
 - b. Craig Moffat on 15 December 2023 (copy minutes of meeting included in bundle at pages 284-285);
 - 15 c. David Watssman on 15 December 2023 (copy minutes of meeting included in bundle at page 286);
 - d. Sandra Kennedy on 15 December 2023 (copy minutes of meeting included in bundle at page 287);
 - e. Weronika Orenczak on 14 December 2023 (copy minutes of meeting
20 included in bundle at pages 288);
 - f. Anthony Oxford on 14 December 2023 (copy minutes of meeting included in bundle at pages 289-290).
24. A grievance appeal outcome letter was issued to the claimant dated 20
25 December 2023. A copy of the grievance appeal outcome letter is included in the bundle at pages 308-310.
25. The claimant commenced employment as Group Accounts Assistant with Gael Force Group on 20 November 2023. The claimant's current salary in
30 this role is £26,000 per annum and she works full time. Her hours of work are 39 hours per week Monday to Thursday 8.30am to 5pm and Fridays 8.30am to 4pm. Her monthly gross pay is £2084. Her monthly net pay is £1796.16.

Respondent's Submissions

26. The following is a brief summary of the submissions by the respondent's solicitor. In support of her submissions she referred to>

5 ***Western Excavating (ECC) Ltd v. Sharp*** [1978] IRLR 27 CA;
 Morrow v. Safeway Stores Pic [2002] IRLR 9, EAT

27. She referred to Ms Tokarczyk's undated letter to the respondent's solicitor in which she set out the matters relied upon in support of her contention that
10 Aquascot was in breach of the implied term of trust and confidence (P. 25-27). She submitted that it was only paragraphs 1, 2 and 3 which were relevant as the remaining allegations were on dates after she had resigned.

28. So far as paras. 1 and 2 were concerned, these meetings were informal and
15 Miss Tokarczyk said in cross-examination that she wasn't expecting anything to be done.

29. So far as para. 3 was concerned, she submitted that the allegations did not constitute a fundamental breach of contract.

20 30. In the alternative, she submitted that even if I were to find that Miss Tokarczyk had been constructively and unfairly dismissed she would have been dismissed, in any event, on the ground of her conduct. However, I advised the respondent's solicitor at the Hearing that I was not persuaded that this
25 submission was well-founded.

Claimant's Submissions

31. Miss Tokarczyk was critical of Aquascot for not enquiring about her health after she had submitted her grievance. She also confirmed, with reference to
30 her meeting with Craig Moffat on 4 September, that she did not expect him to do anything. Further, so far as her meeting with John Housego on 7

September was concerned, she said that she had been told he could not do anything about it.

32. She took exception to the allegation by Mr Oxford that she had called Naeem Sattar a *"cunt"*. Mr Oxford had taken a statement from Weronika Orenczak about this (P. 130). However, she only said that Miss Tokarczyk said by way of a Teams message, *"I hate the (sic) someone makes a cu**nt out of me."*; she had not actually called Mr Sattar a *"cunt"*. She claimed that Mr Oxford had made a *"false accusation"*. She also took exception to Mr Moffatt saying that, *"she didn't know her job"*. She reminded me that she was promoted in March 2023.
33. She also expressed concern that David Watssman and 4 "witnesses" had not been called, which meant that she was not afforded the opportunity of cross-examining them.

Discussion and Decision

The Law

34. Having resigned, it was for Miss Tokarczyk to establish that she had been constructively dismissed. This meant that under the terms of s.95(1)(c) of the Employment Rights Act 1996 ("the 1996 Act"), she had to show that she terminated her contract of employment (with or without notice) in circumstances such that she was entitled to do so without notice, by reason of her employer's conduct. It is well-established that means the employee is required to show that the employer is guilty of conduct which is a fundamental breach going to the root of the contract of employment, or which shows the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee, in those circumstances, is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle her to leave at once.

35. The correct approach to determining whether or not there has been a constructive dismissal was discussed in *Western Excavating*, the well-known Court of Appeal case, to which I was referred. According to Lord Denning, in order for an employee to be able to establish constructive dismissal four conditions must be met:-
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- “(1) there must be a breach of contract by the employer This may be either an actual breach or an anticipatory breach;*
- (2) that breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify her leaving. Possibly a genuine, albeit erroneous interpretation of the contract by*
- 10 *an employer will not be capable of constituting a repudiation in law;*
- (3) she must leave in response to the breach and not for some other unconnected reason; and*
- (4) she must not delay too long in terminating the contract in response to the*
- 15 *employer’s breach otherwise she may be deemed to have waived the breach and agreed to vary the contract.”*
36. Accordingly, whether an employee is entitled to terminate his or her contract of employment “*without notice by reason of the employer’s conduct*” and claim constructive dismissal, must be determined in accordance with the law of contract. It is not enough, therefore, to establish that an employer acted unreasonably. The reasonableness, or otherwise, of the employers conduct is relevant but the extent of any unreasonableness has to be weighed and addressed and a Tribunal must bear in mind that the test is whether the
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- 25 employer is guilty of a breach which goes to the root of the contract or shows that the employer no longer intends to be bound by one or more of its essential terms.
37. So far as the present case was concerned, I was particularly mindful that
- 30 there is implied at all contracts of employment a term that employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust

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

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

38. Further, in *Malik v. BCCI* [1988] 2 AC 20, Lord Steyn stated that in assessing whether or not there has been a breach of the implied obligation of mutual trust and confidence it is the impact of the employer's behaviour on the employee that is significant - not the intentions of the employer. Moreover, the impact on the employee must be assessed objectively.

39. When I considered the authorities, I recognised that a wide range of behaviour by employers can give rise to a fundamental breach of the implied term of mutual trust and confidence. However, the breach has to be "repudiatory" in order for the claimant to rely upon it. Therefore, serious misconduct is required from the employer. This was emphasised by the EAT in *Frenkel Topping v. King* UKEAT/01606/15. In that case, Langstaff J emphasised at paras. 12 and 13 that the test of breach:-

"Is a demanding test. It has been held (see for instance the case of BG v. O'Brien [2011] IRLR at paragraph 27) that simply acting in an unreasonable manner is not sufficient. The word qualifying "damage" is "seriously". This is a word of significant emphasis. The purpose of such a term is identified by Lord Steyn in Malik as being: "apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employees interest in not being unfairly and improperly exploited."

40. *Morrow*, to which I was also referred, emphasised the point that any breach of the implied term is inevitably fundamental; it cannot be just any unreasonable act; it has to be sufficiently serious.

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Present case

41. What then of the present case? Miss Tokarczyk detailed the alleged breaches of the implied term of trust and confidence in her undated letter which she sent to the respondent's solicitor (P.25-27). It was clear that only paras. 1, 2 and 3 were relevant as the other allegations were in respect of dates after Miss Tokarczyk had resigned.
42. So far as the meetings on 4 September, with Craig Moffat, and on 7 September, with John Housego, were concerned, these could not possibly have given rise to a breach of contract, let alone a fundamental breach, as Miss Tokarczyk accepted that she did not expect anything to be done by the respondent following the meetings, something she confirmed at the Tribunal Hearing. She told Mr Oxford at the Grievance Investigation on 17 October that her meeting with Mr Moffat was, "*just an informal chat*" and she didn't want him to do anything (P. 195); she said that she and Ms Kennedy, "*just wanted to let John (Housego) know our problems with Naeem*", that it was, "*informal*" and, "*no outcome was expected*" (P. 195-196).
43. The focus of her claim, therefore, was her verbal exchanges with Tony Oxford at the meeting on 17 October (P.189-207). I wish to record at this stage that Mr Oxford gave his evidence in a measured, consistent and convincing manner and presented as credible and reliable. He was an impressive witness. The manner in which he dealt with Miss Tokarczyk's grievance (P,75/76) and Mr Sattars complaint (P.92-94) was comprehensive. He took statements from several employees and interviewed both Miss Tokarczyk and Mr Sattar at some length. I formed the view that he considered all their allegations very carefully and sensitively indeed.

44. It was what Mr Oxford said to Miss Tokarczyk at that meeting which was the catalyst for her resignation later the same day. She complained that Mr Oxford had wrongly accused her of calling Mr Sattar a “*cunt*” (P.202); and Mr Oxford asking her if she had, “*ever made negative comments about Naeem (Sattar) based on his religion or race?*” (P.202). These two issues raised by Mr Oxford were the “*slander*” which Miss Tokarczyk referred to in her letter of resignation (P.208).
45. So far as the allegation of comments made by Miss Tokarczyk to Mr Sattar was concerned, this was based on a statement which Mr Oxford had obtained from Weronika Orenczak (P.131-132). Strictly speaking, Ms Orenczak did not say that Miss Tokarczyk had called him such but she did use the “C word” in her Teams Message which was about work related matters (P.130). In my view, the “error” which Mr Oxford made involved little more than semantics and Miss Tokarczyk did not deny that she had used the “C word” in her Message.
46. I was not persuaded that what Mr Oxford said was unreasonable, let alone a breach of contract and, even if it was a breach, it was not sufficiently serious, when viewed objectively, to constitute a fundamental breach.
47. So far as the other matter which Mr Oxford raised with Miss Tokarczyk was concerned, namely whether she had ever made, “*negative comments about Naeem based on his religion or race*”, the reason that he raised this was because it was agreed that he would deal not only with Miss Tokarczyk’s grievance (P.75-91) but, at the same time, Mr Sattar’s complaint (P.92/94). There was a basis for Mr Oxford raising this issue with Miss Tokarczyk: in a statement which he had obtained from David Watssman, one of , Miss Tokarczyk’s colleagues, he said that he was, “*very uncomfortable*” about the way in which Miss Tokarczyk and Sandra Kennedy spoke to Mr Sattar about his religion (P.183). It was entirely reasonable, therefore, for Mr Oxford to raise this with Miss Tokarczyk.

48. This did not constitute a breach of contract on the respondent's part either. There was no breach of the implied term of trust and confidence.

49. Miss Tokarczyk failed, therefore, to discharge the onus on her of proving that her employer was in fundamental breach of contract. Accordingly, the claim is dismissed.

50. Finally, I wish to address the issue about witnesses which Miss Tokarczyk raised in her closing submission. It was not necessary for Aquascot to call any other witnesses to address the claimant's allegations of breach of contract. These allegations related to the issues which Mr Oxford raised with her at the Grievance Meeting and the witness statements which he took were part of the Joint Bundle. His evidence alone was sufficient. Indeed, the respondent's solicitor was minded at one stage to call David Chapman, Aquascot's Manufacturing Director who heard Miss Tokarczyk's appeal against the outcome of the grievance but, on reflection decided, that would not be necessary.. In my view, that was the correct decision.

51. The manner in which Mr Oxford dealt with Miss Tokarczyk's grievance was exemplary. His outcome letter dated 17 November 2023 was comprehensive. He partially upheld part of her grievance. However, by that time Miss Tokarczyk had already resigned. In my view, her resignation was not only ill timed, it was unjustified.

**Employment Judge: N M Hosie
Date of Judgment: 21 May 2024
Entered in register: 21 May 2024
and copied to parties**