EMPLOYMENT TRIBUNALS

Claimant: **Miss L Narbeth**

Respondent: **Centre Great Limited**

Heard at: **Cardiff** **On: 22 October 2024**

Before: **Employment Judge C Sharp (sitting alone)**

Representation:
Claimant: In person
Respondent: Mr G Rowlands (Counsel)

JUDGMENT having been sent to the parties on 23 October 2024 and reasons having been requested by the Respondent in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

1. The Claimant was not constructively unfairly dismissed in the judgment of the Tribunal. I explained and set out the legal questions at the start of the hearing, and had the benefit of a bundle totaling 104 pages and hearing oral evidence from the Claimant, Mr David Daniel (Civils Director) and Mr Jack Stuckey (Contract manager). The hearing was listed for two days, but with the consent of the parties I sat slightly late and was able as a result to deliver an oral judgment.

2. The Claimant was an Administrator for the Respondent. She was employed between July 2018 and 3 May 2024. ACAS early conciliation was between 2 & 8 April 2024 and the Claimant presented her claim for constructive unfair dismissal on 7 May 2024.

3. The Respondent is a streetlighting and traffic signals contractor providing installation, maintenance, repairs and replacement services for its clients, most

of whom are local authorities across Wales. Its headquarters are near Bridgend (Brackla), which is near where the Claimant lives, but her role was based on the Coryton roundabout in Cardiff just off the M4. The Claimant's role was to support a key contract with the Welsh Government/South Wales Trunk Road Agency. The Claimant resigned on 26 April 2024 [page 98 of the bundle], saying her notice would be effective on 3 May 2024. She started her new job on 1 May 2024.

4. The Claimant complains that the Respondent's refusal to allow her a phased return to work (by which she confirmed she meant let her work at headquarters, not require her to work in Coryton) in January 2024 and its requirement that she had to work in Coryton are fundamental breaches of contract that destroyed the mutual duty of trust and confidence. The Respondent accepts that factually the acts complained of by the Claimant occurred but denies that they were breaches of contract or fundamental, and submits that it had in any event reasonable and proper cause.

Law

5. The Employment Rights Act 1996 is the starting point for this claim:

"94 The right

(1) An employee has the right not to be unfairly dismissed by his employer. …

95 Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if —…

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. …

98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."

6. The well-known case of Western Excavating (ECC) Limited -v- Sharp [1978] ICR 221 says that for the Claimant to succeed, there must be a fundamental breach of contract that entitles her to resign due to a repudiatory breach by the Respondent. This is something that must go to the heart or the root of the contract and entitles the Claimant to resign without notice. This involves a consideration as to whether there has been an act or omission, or a series of acts or omissions, by the Respondent which was the cause of the Claimant's resignation and amounted to a fundamental breach of contract. There needs to be a consideration of when the breach occurred and if there has been any affirmation by the Claimant, and whether the Claimant resigned in response to the alleged acts or omissions.

7. The implied obligation of mutual trust and confidence in employment contracts requires 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 employee/employer*". This is a definition which has been cited in cases such as Malik -v- BCCI, Woods -v- WM Car Maintenance Services, Imperial Group Pension Trust -v- Imperial Tobacco and Lewis -v- Motorworld Garages Limited, all of which are well known.

8. The implied obligation is formulated to cover many situations and a balance has to be struck between the employer's interests in managing the business that they run as they see fit, and the employee's interests in not being unfairly and improperly exploited. It is a mutual obligation. In assessing whether there has been a breach, what is of significance is the impact of the employer's behaviour on the employee, rather than that which the employer intended BG PLC -v-O'Brien [2001].

9. The burden lies on the employee to prove the breach on the balance of probabilities; this means that the employee must prove the alleged act or omission, and the employee must prove that the employer's conduct was without reasonable and proper cause. The test whether such proven conduct, in the absence of reasonable and proper cause, amounts to a breach is severe; Gogay v Hertfordshire CC. It is not enough for the employee to prove the employer has done something which is simply in breach of contract, or "*out of order",* or perhaps unreasonable. She must prove that the degree of breach was sufficiently serious, or calculated, to cause such damage that the contract can be fairly regarded as repudiatory and that repudiation accepted. The cases of Croft -v- Consignia PLC and The Post Office -v- Roberts both indicate that the quality of the breach must be substantial. It must go to the heart of the contract – its root or to put it another way, it must be fundamental.

10. Deciding to resign is for many, if not most, employees is a serious matter. It will require them to give up a job which may provide them with their income, their families with support, and be a source of status to them in their community.

Their mortgage and regular expenses, may depend upon it and economic opportunities for work elsewhere may be slim. There may, on the other hand, be employees who are far less constrained, people who can quite easily obtain employment elsewhere, to whom those considerations do not apply with the same force. It would be entirely unsurprising if the first took much longer to decide on such a dramatic life change as leaving employment which had been occupied for some eight or nine or ten years than it would be in the latter case, particularly if the employment were of much shorter duration. In other words, it all depends upon the context and not upon any strict time test. This guidance arises from the precedents of W E Cox Toner International Limited-v- Crook [1981] IRLR 443 and Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121.

11. The reason for resignation is another key question. The effective cause does not need to be the sole or dominant cause in the case of Jones v F Sirl & Son (Furnishers) Ltd [1997] IRLR 493.

12. If the Claimant does establish that she resigned in response to a proven repudiatory breach of contract then the Tribunal must go on to consider whether the reason for her constructive dismissal was a potentially fair one (Employment Rights Act 1996).

Findings

13. Did the Respondent fundamentally breach the Claimant's contract in one of two ways pleaded by the Claimant? The first alleged breach of contract was the Claimant said that the Respondent failed to agree a phased return; she confirmed that the Claimant's position here was that it was agreed in January 2024 that she would return to work (having been on sick leave) and at first attend the office in Brackla close to her home. There is no dispute that Mike Duffy from human resources did tell the Claimant she could start her return to work but was overruled by the operational team, including Mr Daniel. The explanation was that the job was in Coryton and had to be carried out there, so the Claimant's attendance at Brackla did not assist the Respondent. The Claimant has shown this alleged breach factually occurred.

14. The second alleged breach of contract is that the Claimant was required to work in Coryton. This is not disputed by the Respondent. The Claimant has shown this alleged breach factually occurred.

15. The key question is whether either of these alleged breaches of contract were in actuality a breach of contract. The Claimant's contract of employment [pages 38 onwards of bundle] was signed and agreed by the parties when she commenced her role on 2 July 2018. The contract is in two parts; the first part contains general provisions such as notice periods. At clause 5.1, it states that the Claimant's place of work is set out in the key information sheet (which is

the second part of the contract) or it could be anywhere else that the Respondent reasonably determines, including other company premises or work sites across the UK depending on the nature of her role. It goes on to explain that the Claimant may be expected to travel.

16. The second part of the contract, the key information sheet, does not say that the Claimant's role was in Brackla as she asserted was the original agreement. It states that the Claimant would be based in South Wales; it covers all offices in South Wales, whether it is Brackla, Cwmbran (another office where the Claimant worked in the past) or Coryton. In my judgment, it cannot be a breach of contract to require the Claimant to work in Coryton, a place where she worked from July 2019, when she started to argue against this location from September 2022 (having worked remotely during the pandemic).

17. I also took into account the implied requirement for the contract to be reasonably applied. However, the ability to work from home during the pandemic was because the security provisions were relaxed to enable it for public health reasons; they no longer applied by September 2022. I heard evidence which was unchallenged on this point, and in particular I heard evidence about the secure nature of the work done in Coryton. I will not outline it in detail in this judgment for security reasons, but it could be reasonably described as daily checks on particular systems. Coryton is a secure building and the secure work must be done there. There was no meaningful challenge to this evidence by the Claimant; the Claimant's main argument was that her role could have been altered to remove such work from her. The evidence from Mr Daniel and Mr Stuckey explained what the work was and why it was part of the Claimant's role to my satisfaction (in summary, an administrator could do it and it was the Claimant who was the administrator for that team; it was not cost effective to ask an engineer to do it).

18. The Claimant's main reason for objecting to continuing to work in Coryton was that during the pandemic she gave away her car. That was the Claimant's decision; it was nothing to do with the Respondent. The Claimant understood that she was only temporarily working from home due to the COVID pandemic; there is no evidence or argument that she was promised that she could stay at home. The Claimant chose to give away her most practical option to get to work, and that was why she did not want to return to Coryton in my view. The Respondent was aware of the difficulty and despite the Claimant being able to use public transport to get there (though the Tribunal accepts it was not an easy journey), it arranged for a colleague to drive out of his way to take the Claimant to and from work. The Respondent even allowed the Claimant to work shorter hours than her contractual requirement with no docking of pay if it meant she could be brought to and from work by the colleague. This is unprecedented in the industrial knowledge of the Tribunal and more than reasonable conduct by the Respondent, given the Claimant had given away her car.

19. At the Tribunal, the Claimant talked about her personal difficulties (for which there was no objective evidence). Both at the Tribunal and during her employment, the Claimant explained that she did not like working at Coryton because "… *I was in a roundabout and I couldn't leave easily*". The Respondent's answer at the time was that if the Claimant needed to leave, it could make arrangements as she was not alone in the office and Coryton was a key location with people coming and going. I did not accept the Claimant's evidence that she was alone. That evidence conflicted with her other evidence, such as there were dozens of people upstairs so they could do the secure work. I suspect these other people referred to were Traffic Wales staff, but that was never clarified in the evidence before me. The Claimant said that "*I couldn't get in the building*", but it turned out she could get in the building, she just needed someone to let her in – this showed she was not alone. The evidence heard from the Respondent's witnesses is there would normally be two full time members of its staff in the office; I prefer this evidence due to the inconsistencies with the Claimant's account and the contemporaneous evidence. When I looked at the contemporaneous evidence, the Claimant did not complain about lone working; she was clear that she did not want to work in Coryton and explained it principally in terms of having given away her car.

20. The evidence before me is that the Claimant was a competent employee greatly respected by the Respondent. I think that is more likely to be true than not, because the Respondent went to considerable efforts to help the Claimant get to Coryton, despite the fact that the obligation is on the employee to get to their place of work, not the employer to make it happen.

21. Taking everything into account, I find that neither alleged breach of contract was in fact a breach of contract. The Claimant was contractually required to work in South Wales, including Coryton, and it was reasonable for the Respondent to require her to work there due to the nature of her role and that the work had to be carried out in Coryton. It was not a breach of contract for the operations team, which fully understood the requirements of the Claimant's role, to over-rule human resources in January 2024 as the Claimant's full job could not be carried out in Brackla.

22. In any event, I am satisfied that the Respondent had reasonable and proper cause for it to require the Claimant to continue to carry out her job in Coryton up and to the point that she chose to resign. I am also satisfied that the Respondent acted reasonably by offering the Claimant an alternative role in Brackla in April 2024. The Claimant did not respond to it, merely saying *"I am going to consult my Trade Union Representative*". She never engaged further on the matter. The Claimant's explanation of this failure was "*I have been begging for months and months and months and now finally they give it".* This was not a constructive or reasonable approach. In the Respondent's email, it explained why the role was now available; the individual in that role was

leaving. The Claimant did not engage in discussions about the new role; instead, she left to work for another employer in Brackla.

23. Having concluded that there was no breach of contract, I did not address whether any breach was fundamental. If I am incorrect in that finding, the Claimant knew as early as September 2022 she had to work in Coryton and was told in January 2024 by Mr Duffy that Brackla could only ever be a temporary option. Throughout 2024, the Claimant was repeatedly told the job was in Coryton. The Claimant did in my view delay too long if she viewed the requirement to work in Coryton and the refusal to let her work temporarily in Brackla as a breach of contract.

24. In the event that I am incorrect in that finding, I am satisfied that the Claimant did not resign because of a breach of contract but because in her own words *"I want to go and work with my old team with familiar faces".* The Claimant resigned to work with people who she had previously worked with for about a 12-year period, to be near her home and for a pay rise. The issue about Coryton no doubt was part of the reason she left, but the Claimant's evidence in my view shows that the resignation was more about these other benefits.

25. As a result of the above findings, the Claimant's claim for constructive unfair dismissal was not well-founded and was dismissed.

Employment Judge C Sharp
Dated: 26 November 2024

REASONS SENT TO THE PARTIES ON

12 December 2024

Katie Dickson
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS