



# **EMPLOYMENT TRIBUNALS**

**Claimant:** Miss S.Harcarikova

**Respondent:** Happy Kombucha Ltd

**Heard at:** Croydon (by CVP)

**On:** 13 & 14 January 2025

**Before:** Employment Judge Richter

## **REPRESENTATION:**

**Claimant:** In Person

**Respondent:** Mr Ushieagu (Peninsula Law)

# **JUDGMENT**

The judgment of the Tribunal is as follows:

1.1 Miss Svetlana Harcarikova brings a claim that she was unfairly dismissed by the

Respondent Happy Kombucha Ltd.

1.2 The Respondent is a small company producing cultures and starter kits for fermented foods. Marcus and Michelle Holborn are husband and wife and are the directors of the company.

1.3 It is common ground that Miss Harcarikova was employed by the Respondent. She commenced employment in around the March of 2020 and by email she indicated that she resigned on 8<sup>th</sup> March 2024. She submitted a claim to the Employment Tribunal that day.

1.4 Her last day in attendance at the Respondent's premises, her place of work, was 10<sup>th</sup> January 2024. Miss Harcarikova claims that on that day Mr and Mrs Holborn acted in a way which breached the implied obligation of confidence and trust in her employment contract which entitled her to resign. From 10 January 2024 up until 8 March 2024 Miss Harcarikova submitted notes from her GP confirming that she was unfit to work due she says to stress and anxiety arising from the events which had taken place on 10 January.

1.5 I have heard evidence and submissions over two days. I have heard oral evidence from Miss Harcarikova and from Mr and Mrs Holborn. I have been referred to an agreed bundle prepared for this hearing consisting of 182 pages. I have also listened to an audio recording made of parts of a meeting which occurred on 10 January 2024 between Miss Harcarikova and Mr and Mrs Holborn. I have heard submissions from Mr Ushieagu representing the Respondent and from Miss Harcarikova who has represented herself. In order to assist Miss Harcarikova, I have permitted that a notetaker assist her. I confirmed with Mr Ushieagu at the outset of the hearing that Mrs Holborn, who has recently undergone surgery, required no adjustments in order to participate in the Tribunal process. I permitted her to leave the hearing as soon as

she completed her evidence, as requested, but in fact did not do so. Her husband indicated that he required assistance with finding the correct pages when being referred to documents and, without objection, Mrs Holborn was able to assist him in finding the relevant passages in documents.

### **The Law**

- 2.1 S.95(1)(C) of the ERA provides that an employee is dismissed by his employer where the 'employee terminates the contract under which he is employed...in circumstances where he entitled to terminate the contract without notice by reason of the employers conduct.'
- 2.2 The focus for this Tribunal is to determine the nature of the conduct of the employer which entitled the employee to resign and in the leading case of Western Excavating (ECC) Ltd v Sharp [1978] QB 761 Lord Denning, as he then was, confirmed that the employer must be in breach of contract for a claim of constructive dismissal to succeed. The test, he stressed, is purely a contractual one and not one of unreasonableness, to be judged objectively.
- 2.3 The key question then is whether the employers' conduct is clearly a fundamental breach of one of the terms of the contract and therefore sufficiently important to be a repudiation of the contract by the employer. In Pederson v Camden London

Borough Council [1981] ICR 674 it was confirmed that this was a mixed question of fact and law.

- 2.4 I have been referred in particular to the case of Malik v BCCI [1998] AC 20 where Lord Steyn confirmed that a universal term implied in employment contracts was that the employer shall not “without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee”.
- 2.5 If I were to find that Miss Harcarikova was dismissed I must determine if dismissal was potentially a fair and sufficient reason in the circumstances as set out at s.98(4) ERA.

### **The Facts**

- 3.1 It is agreed that on 10 January 2024 Miss Harcarikova was at work at the Respondent’s premises. Mr Holborn approached her as she was working and asked her to come with him to an office for a meeting.
- 3.2 In the office Mr Holborn discussed with Miss Harcarikova three issues 1) he asked if she was happy at work because, he observed, he did not think she had the same work ethic she had previously had; 2) he said that he had watched CCTV where Miss Harcarikova had not mopped the floor in a food preparation room when she

had been asked to by Mrs Holborn; and 3) he said that she had submitted an incorrect number of hours on her pay claim for her previous working week.

3.3 Again it is agreed that after a short break in the meeting Mrs Holborn joined it. Initially Mrs Holborn explained why she believed that Miss Harcarikova had overclaimed her hours and referred to timings of her attendance at the premises taken from CCTV footage. She then went on to accuse Miss Harcarikova of unprofessional behaviour towards her by slamming doors in her presence, disparaging her to other workers, calling her names behind her back and not carrying out her instructions.

3.4 An audio recording was made by Mr Holborn of the parts of the meeting set out above which I have listened to. What occurred after that is disputed. Miss Harcarikova asserts the following; that Mrs Holborn left the meeting but returned to it shouting at her that she did not trust the claimant, could not work with her and that she never apologises. Miss Harcarikova says she did the say 'sorry' as she was distressed and thought she would lose her job if she did not. This seemed to calm Mrs Holborn and Mr Holborn then encouraged the Claimant and Mrs Holborn to 'have a hug'. The Claimant then says she was taken from the office into the warehouse where all staff who were working were called across. Miss Harcarikova says she was crying and distressed but Mr Holborn told the assembled staff that

she was not going anywhere (as in leave the company) that she would be happy from now on and would work properly.

- 3.5 Mr and Mrs Holborn dispute the Claimant's account set out above. They assert that after the recording Mr Holborn had a lengthy personal talk with the Claimant talking about Christmas and personal matters. As they left the office he accepts he did call together the 3 staff who were working in the area and told them that there were no issues with the claimant and that he was available to support staff and pointed out his mobile number. He did so he said to support the Claimant given that the fact that she had been called into a meeting would have been obvious to those working.

### **The claim**

- 4.1 Miss Harcarikova identifies five issues in respect of what occurred on 10<sup>th</sup> January 2024 as giving rise to the alleged breach of confidence and trust;

Firstly – that she had no notice of a formal meeting which had a clear potential for sanction;

Secondly – that an audio recording was made of the meeting without permission or explanation;

Thirdly – unjustified accusations were made at the meeting of misconduct and poor performance;

Fourthly – there was hostile abusive shouting during the meeting which caused deep anxiety fear and frustration; and

Fifthly – she was paraded in front of fellow employees and embarrassed in front of them.

She asserts that the cumulative effect of these was to significantly affect her mental health such that she could not return to work and meant she had to resign as set out.

4.2 The Respondent does not accept that any of the events set out either singularly or cumulatively breach the term of confidence and trust and as such there was no reason for the Claimant to resign as she did.

### **Findings of Fact**

6.1 Whilst I found Miss Harcarikova to be a credible witness I did find that she was clearly a witness still deeply emotionally effected by the events she describes. It is clear that what occurred on 10 January 2024 has affected her greatly. She describes a loss of confidence and change of character as a result of what happened and in particular how her strong work ethic was called into question. This does in my judgment have a bearing on her evidence and how she perceives the events which occurred.

6.2 I found both Mr and Mrs Holborn to similarly be credible witnesses. They too were at times effected by emotion when describing what had occurred but understandably not to the same extent as Miss Harcarikova. It is clear that both Mr

and Mrs Holborn had held the claimant in the highest regard both personally and professionally. Mr Holborn described Miss Harcarikova as an exceptional member of staff who was always diligent until the events which they had to speak to her about.

6.3 I consider then the issues raised by the claimant. Firstly that no formal notice of the meeting was provided to the Claimant. The Claimant explains that she was called to the meeting with no notice, allegations about her conduct were put to her and she feared that she was to lose her job or other sanction was to be imposed upon her. She draws attention to the ACAS code concerning grievance and disciplinary processes in the workplace. This provides that notice should be given to a member of staff prior to a disciplinary process commencing and that she should have the right to be accompanied to a meeting where sanction might be imposed. She highlights that the staff policy for the Company indicates that formal meetings should be recorded as this was.

6.4 Mr and Mrs Holborn assert that the meeting was not a formal disciplinary meeting. I note that at the start of the recording Mr Holborn states that the meeting is 'informal'. Mrs Holborn gave evidence that although there had been concerns raised about the Claimant's performance in the workplace a decision had already been made not to proceed to with any of the issues to a formal disciplinary process but instead an informal conversation should be conducted. Mrs Holborn said that

the situation had been discussed with the company's HR who had advised them that this informal meeting to discuss the issues should be arranged.

6.5 I do observe that there is some confusion as to the precise designation of the meeting. Both Mr and Mrs Holborn referred in their evidence at times to the meeting being part of an investigatory process or 'fact finding' which does suggest that the decision not to take disciplinary action was not as clear cut as has suggested. Nonetheless I am satisfied that in reality the meeting was an informal one. Mr Holborn stated that at the start of the recording and although the issues with Miss Harcarikova are raised and discussed they are not done in 'fact finding' way with a clear seeking of an account from the Claimant. I can well understand how Miss Harcarikova may well have been taken by surprise by the meeting and may well have interpreted it to be a more formal interview than it was, particularly given that a recording was being made of it.

6.6 The ACAS Code sets out that an employer should try to resolve issues in the workplace informally. It makes clear that this is often the best approach and should if possible be the first step. It suggests 'a quiet word' may be all that was needed. Given that I conclude that this was an informal meeting there was no requirement under the ACAS code to have provided notice of it to Miss Harcarikova, although doing so might have prevented the Claimant forming the impression that this was

a formal disciplinary meeting. The Code of course provides the minimum standards it is always open to a caring and proactive employer to seek to exceed them.

#### Recording of meeting

6.7 Miss Harcarikova gives evidence that she was not asked for her consent to record the meeting nor was the purpose of doing so explained to her. Mr Holborn disputes this and says he sought her permission for recording to keep a record as soon as they entered the office which she gave. I do not in fact find it necessary to resolve this factual dispute because the reality is that, as Miss Harcarikova accepts, she was aware that the meeting was being recorded. Mr Holborn used his mobile telephone to record it which was placed in view on the table in front of them. Whilst I readily understand why this action may well have led the Claimant to consider that the meeting was of a more formal nature because of this process I am of the opinion that even were the recording made without her permission having been sought at the outset this was not an action that could breach the term of confidence and trust. This was not a covert recording set to try and entrap the Claimant this was a recording made overtly. It would in those circumstances have been clear that the purpose would have been to keep a record of the discussions. I can not find on its own that it would lead to a breach of the implied term.

Unjustified accusations of misconduct and poor performance

- 6.8 Miss Harcarikova explains that she was not provided with any documentation or access to any materials before the meeting setting out the accusations against her.
- 6.9 Mrs Holborn gave evidence to having received complaints from other members of staff in respect of the Claimant's performance in the run up to the meeting on 10 January 2024. No other member of staff has been called to give any evidence of this and this was not a topic which was discussed during the recorded part of the meeting as set out above, in the circumstances I place no weight on this aspect. Mr Holborn referred to his awareness of a gradual 'slipping of standards' by the Claimant which he said had prompted the meeting to occur. This was based in part on his own observations, as he set out in the meeting on CCTV he had seen and also on the records for pay that had been submitted.
- 6.10 As set out above I am satisfied that the meeting was arranged as an informal one. I am satisfied that it was not organised to find facts or impose sanctions. As such there was no requirement under the ACAS Code to provide materials in relation to any alleged conduct or performance issues. Again I can well understand how Miss Harcarikova on the day may have interpreted the putting of negative suggestions to her as being part of a disciplinary process but Mr Holborn did make clear in the

recording that he wanted the working relationship to move forward past the issues that were being discussed if the claimant was happy to continue working at the Company.

Hostile and abusive shouting

6.11 Miss Harcarikova describes in her evidence that during meeting she was shouted at by Mrs Holborn who was confrontational and who prevented the Claimant from speaking. She asserts that the behaviour of Mrs Holborn distressed her, made her fearful and anxious.

6.12 In her evidence Mrs Holborn said that she has always had a loud voice. She explained that in fact at the time that was exacerbated because she was ill and awaiting an operation which would affect her throat. She gave evidence of an operation upon her thyroid and detailed the reasons for it and the effect upon her which I do not set out in detail here. She described that at the time of the meeting she was unaware her voice was as loud as it was. Although she did not accept shouting Mrs Holborn did accept that she had not acted professionally during the meeting and she reflected with hindsight she should perhaps not been at work during this period because of her illness. Mr Holborn in evidence said that he believed that his wife had 'done her best' during the meeting considering her condition at the time.

- 6.13 The parts of the meeting which were recorded were played by the claimant to the Tribunal as part of her case. A transcript of the recording is within the bundle at p.115 – 121. In my assessment the recording establishes that the first part of the meeting conducted between Mr Holborn and Miss Harcarikova was a properly conducted and calm discussion of work place issues, albeit there was evident undercurrent of emotion but such as would be expected at such an encounter.
- 6.14 In the second part of the recording when Mrs Holborn joins the meeting it is clear that the tension increases. For whatever reason Mrs Holborn does adopt an accusatory tone both in manner and content when engaging in discussion with Miss Harcarikova. When the discrepancy in the payslips and hours is discussed Mrs Holborn makes clear that 'I don't have time to be farting on with this every week'. When that matter is resolved, very largely in the Claimant's favour, Mrs Holborn responds by adding personalised further matters accusing Miss Harcarikova of slamming the door after speaking to her and relays what she says she has heard the Claimant say on CCTV where she had referred to Mrs Holborn as 'her'. She further complains to the Claimant that she refused to clean under barrels as she was instructed to by her. When Miss Harcarikova denies this (she had explained earlier in the meeting that the barrels were too heavy to move, an explanation which was accepted by Mr Holborn) Mrs Holborn escalates her rhetoric saying that

she had heard the Claimant say 'there's no fucking way I'm moving these fucking barrels again' although this had not formed part of her complaint before.

6.14 Most of these later exchanges were delivered by Mrs Holborn with a raised voice although from the recording not to such an extent that I find her to be shouting. The effect of the raised voice within the confines of an office are of course difficult to fully assess. On a number of occasions Mrs Holborn does cut across answers Miss Harcarikova was starting to give.

6.15 Miss Harcarikova gave evidence that after the recorded part of the meeting Mrs Holborn left the office before returning to the meeting and continued shouting at her saying that she could not work with Miss Harcarikova. She then says Mrs Holborn modified her tone once the Claimant said 'sorry' and then hugged her and invited her to take the rest of the day off. Mr and Mrs Holborn deny that this occurred as I have set out above. I do note the surprisingly swift change of emotion which it is suggested Mrs Holborn underwent and as there is no other evidence to support the Claimant's account of these events and as such I can not be satisfied that they did occur as the Claimant alleges.

6.16 Notwithstanding that finding as accepted by Mrs Holborn on reflection her behaviour during the recorded part of the meeting was not of the high professional

standards which are to be expected by an employer dealing with staff issues. I agree. I am satisfied that her conduct would have had a negative effect upon the Claimant and that she would have been upset and distressed during the meeting.

Fifthly – she was paraded and embarrassed in front of fellow employees.

6.17 Miss Harcarikova gave evidence that after the meeting as she was leaving Mr Holborn called together the staff who were working and told them all that she would be working well from now on. She accepts that Mr Holborn did not give details of what had been discussed but that his action in calling the staff together was humiliating and degrading. She said she was distressed at the time.

6.18 Mr Holborn accepts that he did call the 3 or 4 members of staff working together and told them that the Claimant was returning to work and that there was no issue between her and him. He said that he was available to support any member of staff and pointed out his telephone number on a whiteboard nearby. Mr Holborn explains that he did this because the other workers would have been aware that Miss Harcarikova had been called into a meeting and he wanted to show his support for her by saying she had his confidence.

6.19 I accept that Miss Harcarikova would have been distressed given the meeting which had occurred and the issues which had been discussed. Even had she

calmed down, as the Respondent asserts, from further conversation after the meeting I can readily understand that the calling together of staff in the circumstances was likely to lead to her becoming anxious and upset again. Whilst I accept the intentions Mr Holborn says he had, the conduct in calling the staff together in Miss Harcarikova's presence would but only have a distressing effect upon her and would highlight that workplace issues had been raised and discussed with her. Whilst the detail was not mentioned this calling together would have highlighted that there had been concerns raised. This, in my judgment, would best have been kept confidential or dealt with through other means with any other particular member of staff concerned.

### Conclusions

6.20 Having reached those findings in respect of each matter I consider whether, individually or collectively, they do destroy or seriously damage the term of trust and confidence to the extent where Miss Harcarikova was entitled to resign. I remind myself that the burden is upon the Claimant to establish that the conduct did so destroy or seriously damage the relationship.

6.21 I remind myself that I must judge the matter contractually and objectively. I am also reminded that the test is objective and is a significant one. In the case of Frenkel Topping Ltd v King EAT 0106/15 at paragraphs 11-12 I am reminded that the word 'serious' requires significant emphasis. In Transco plc (formerly British

Gas plc) v O'Brien 2001 IRLR 496, EAT at paragraph 27 I am reminded that even unreasonable conduct is not necessarily sufficient to satisfy the test.

With those considerations in mind in this case I note that:

- i) The period of the recording where Mrs Holborn engages in the conduct I have set out is short;
- ii) That when matters of conduct and performance are being discussed in the workplace they are almost always likely to give rise to heightened emotions and a period of tension;
- iii) That the above is perhaps particularly likely to be the case in a small business where people know each other well and have established relationships;
- iv) That at the time Mrs Holborn was suffering from a medical condition which affected her in the way she has described and that the Claimant knew of this and understood her presentation at the time;
- v) As far as the team meeting afterwards is concerned no detail of the discussion was given and the clear message was conveyed that Miss Harcarikova would be continuing to work at the Respondent. The meeting was brief, the number of staff were limited and known to Miss Harcarikova and they were aware something had occurred earlier in the day when she had been called into the meeting.

6.22 Overall this is a balanced case but after careful consideration I am not satisfied that the events as I have set out of 10 January 2024 were sufficient either alone or

cumulatively to destroy or seriously damage the relationship of trust and confidence. I do appreciate the Claimant's position and have sympathy for her position given the way that the meeting was conducted does fall short of the standards that should be expected in the workplace. In my judgement however the facts as I find them to be looked at objectively and applying the contractual test as I must, do not amount to a breach by the Respondent of the implied term of trust and confidence. As such this claim must be dismissed.

**Employment Judge Richter**  
14<sup>th</sup> January 2025

Judgment sent to the parties on  
3<sup>rd</sup> February 2025

**Note**

Reasons for the judgment were given orally at the hearing. Written reasons will not be provided unless a party asked for them at the hearing or a party makes a written request within 14 days of the sending of this written record of the decision.

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