THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant: Mrs S Bell
Respondent: Alicia Coffee House Limited

Heard at: Newcastle Hearing Centre (by CVP) **On:** 9 and 15 January 2025

Before: Employment Judge Morris (sitting alone)

Representation:
Claimant: In person
Respondent: Ms S Richards, consultant

JUDGMENT

The Judgment of the Employment Tribunal is as follows:

1. The claimant did not terminate the contract under which she was employed in circumstances in which she was entitled to terminate it without notice by reason of the respondent's conduct, as provided for in section 95(1)(c) of the Employment Rights Act 1996.

2. It follows that the claimant's complaint under Section 111 of that Act that her dismissal was unfair contrary to Section 94 of that Act cannot be well-founded and it is dismissed.

REASONS

The hearing, representation and evidence

1. This was a remote hearing, which had not been objected to by the parties. It was conducted by way of the Cloud Video Platform as it was not practicable to convene a face-to-face hearing, no one had requested such a hearing and all the issues could be dealt with by video conference.

2. The claimant appeared in person and gave evidence.

3. The respondent was represented Ms S Richards, consultant, who called Mr J Adam, area manager of the respondent, to give evidence on its behalf.

4. For her evidence in chief the claimant relied upon a transcript of a meeting conducted by a consultant on behalf of the respondent on 24 June 2024 in relation to a grievance that had been raised by the claimant. The evidence in chief on behalf of the respondent was given by way of a written witness statement from Mr Adam. The Tribunal also had before it an initial file of documents comprising 143 pages. The numbers shown in parenthesis below are the page numbers (or the first page number of a large document) in that initial document file. Additional documents were provided by both parties during the period between the first and second days of the hearing, which, by consent, I agreed could be introduced. The numbers below shown thus (Cx) are the page numbers of the documents of the additional file of documents introduced by the claimant. The numbers below shown thus (Rx) are the page numbers of the documents of the supplementary file of documents introduced by the respondent.

The claimant's complaint

5. The claimant presented a single complaint to the Tribunal under Section 111 of the Employment Rights Act 1996 ("the Act") that she was dismissed by the respondent (in that she terminated her contract of employment in circumstances in which she was entitled to terminate it without notice by reason of the respondent's conduct as provided for in Section 95(1)(c) of that Act) and that dismissal was unfair contrary to Section 94 of that Act, by reference to Section 98 of that Act.

6. The respondent denied the claim. In particular as follows:

6.1 It denied that the respondent's treatment of the claimant amounted to a breach of any express or implied terms of her contract of employment.

6.2 If there was such a breach it was not sufficiently serious as to constitute a repudiatory breach.

6.3 If there was a repudiatory breach the claimant, by her conduct, waived such breach.

6.4 In any event the claimant's resignation was not in response to the alleged breach.

6.5 Any dismissal of the claimant was fair by reason of some other substantial reason.

6.6 Any compensation awarded to the claimant should be reduced by 25% to reflect her unreasonable failure to follow the ACAS code of practice on disciplinary and grievance procedures.

The issues

7. The issues to be determined at this hearing are as follows, the references to "the respondent" being read to include, also, relevant employees acting on its behalf:

7.1 Did the actions of the respondent either separately or cumulatively amount to a breach of any of its express contractual obligations to the claimant?

7.2 If not, did the actions of the respondent either separately or cumulatively amount to a breach by the respondent of the term of trust and confidence that is implied into all contracts of employment: i.e:

7.2.1 Did the respondent conduct itself in a manner that was calculated or likely to destroy or seriously damage the relationship of mutual confidence and trust between it and the claimant?

7.2.2 If so, did the respondent have reasonable and proper cause for doing so?

7.3 Was the breach a fundamental one: i.e. was it so serious that the claimant was entitled to treat the contract of employment as being at an end?

7.4 Did the claimant, at least in part, resign in response to the breach: i.e. was the breach of contract a reason for the claimant's resignation?

7.5 Did the claimant affirm the contract before resigning: i.e. did the claimant's words or actions show that she chose to keep the contract alive even after the breach?

7.6 If the claimant was dismissed, what was the reason or principal reason for the dismissal: i.e. what was the reason for the breach of contract?

7.7 Was that reason a potentially fair reason by reference to section 98(1) of the Act?

7.8 By reference to section 98(4) of the Act, did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

Consideration and findings of fact

8. I first record the point I made to both parties during the hearing that I could only come to my Judgment on the basis of the evidence that had been presented to me. I particularly addressed this point to the claimant because, from time to time, she stated that she had corroborative documentary evidence at home which she had failed to produce for the hearing; this notwithstanding, first, an order of the Tribunal requiring her to do that and, secondly, her having prepared between the first and second day of the hearing a supplementary file of documents comprising 41 pages, which I agreed could be admitted despite lateness. Indeed, the claimant had failed to comply with any orders of the Tribunal and it could well be that her failure to do so, particularly in relation to the provision of documents and witness statements, led to her not being in a position to present her claim as well as she might otherwise have done.

9. In that context, having taken into consideration all the relevant evidence before the Tribunal (documentary and oral), the submissions made by or on behalf of the parties at the hearing and the relevant statutory and case law, including that referred to by Ms Richards, (notwithstanding the fact that, in the pursuit of some conciseness, every aspect might not be specifically mentioned below), I record the following facts either as agreed between the parties or found by me on the balance of probabilities.

9.1 The respondent is located in Norwich and is a small to medium sized employer. It operates three coffee shops one of which is in Sunderland.

9.2 The claimant was employed as manager of that Sunderland coffee shop. She was initially employed by a different company from 2 April 2019 but, when the business of that company was taken over by the respondent, her contract of employment (32) transferred to the respondent on 4 March 2024 pursuant to the provisions of the Transfer of Undertakings (Protection of Employment) Undertakings 1981.

9.3 That contract provides, amongst other things, that the claimant's salary will be £20,000 per annum and that her normal hours of work are 42.5 per week in accordance with a rota that would be notified to her on a weekly basis. By letter dated 30 March 2023, the claimant was informed by her then employer that her salary would increase to £25,200 per annum from 1 April 2023 (39). That was her salary at the point of the transfer.

9.4 Thus, at the time of the transfer of the business to the respondent the claimant's salary was £25,200 per annum. As the claimant was employed for 42.5 hours each week, that equated to £11.40 per hour. The claimant's evidence was that this approach of the respondent to paying her by reference to an hourly rate and number of hours worked was first introduced in her payslip of 31 May 2024 but given that this approach is also shown in the payslips dated as early as 15 March 2024, that cannot be correct. Be that as it may, I asked the claimant what her reaction had been to the principle of changing the basis of her pay from annual salary to hourly. Her response surprised me in that she said that she was "quite happy but not happy that her hourly rate was below that of a supervisor".

9.5 Three pay slips provided by the claimant dated 15 March, 22 March and 5 April 2024 respectively show that she received taxable pay of £484.50, £837.90 and £513: a total of £1,835.40. In the part of that month of March 2024 following the transfer of the claimant's employment to the respondent, whereupon it became responsible for the claimant's pay, she worked a total of 25 days.

9.6 Commencing on the day of the transfer the claimant was away from work for one week, during which time Mr Adam worked there setting things up, and she could have been away for a second week due to the fact that her father was seriously ill.

9.7 When the claimant returned to work she found that certain of the personal possessions that she had placed in the office above the store had been cleared to one side of the desk. The claimant's evidence was that this was unacceptable and showed that she was no longer the manager but there is no evidence that this was solely her office and I find that it was understandable that Mr Adam used it when he was working at the store and moved the claimant's possession in order that he could use the desk.

9.8 The respondent increased the claimant's salary to £27,625 from 1 April 2024, equating to £12.50 per hour. I am not satisfied that this is consistent

with the claimant's contention that Mr Adam stated that he could not see her worth, which he denied saying.

9.9 One of the other employees at the Sunderland shop is the supervisor, who had been a long-standing friend of the claimant and whom the claimant appointed. In oral evidence the claimant agreed that this person would stand in for her when she was not at work (to which she did not take exception) and referred to her as her "second-in-command".

9.10 At the same time as the respondent increased the claimant's salary it increased the supervisor's wage to £13 per hour. Mr Adam explained that this was because she had had to work excessive hours to cover the claimant's absence, in one week working for 55 hours, and she had done "an amazing job" attending to everything except the staff rotas. He further explained that the respondent had "panicked" as they were not from the area and, if the supervisor quit, it would leave the respondent without anyone running the store. As he put it, "we had to keep her onside". His evidence, however, was that the claimant had been promised an increase as soon as she was back on site. As recorded above, this was effected by the claimant's salary being increased to £27,625 from 1 April 2024. Mr Adam's oral evidence was that he had also agreed verbally with the claimant that her salary would be increased to £30,000 per annum by the end of July, which would equate to £13.50 per hour and that would be more than the supervisor's hourly wage of £13 per hour but there is no mention of that in Mr Adam's witness statement and no corroborative documentary evidence.

9.11 In this regard, the record in the transcript of grievance, which the claimant relied upon as her witness statement, includes as follows, "I don't mind being on a low pay because it's still a salary and I still have a mortgage to, and I know legally he hasn't dropped my salary so legally I can't do anything about that, but morally, a supervisor above a manager is just, it's soul destroying." (119/120). This statement is consistent with the claimant's answer to my question recorded above that she was "quite happy" with the changed basis of her pay from salary to hourly.

9.12 As a consequence of the claimant's absence from work so soon after the transfer, the respondent brought the manager it employed at the respondent's Darlington store to the Sunderland store for two weeks to help out. She arrived on 5 March 2024. When the claimant returned to work she informed Mr Adam that the supervisor was capable of running the store when she was away. As such, Mr Adam asked the Darlington manager not to come to the Sunderland store again. The claimant's evidence is that the Darlington manager told her that she was not allowed to do rotas or suppliers any more but that is not borne out by the exchanges of messages between the claimant and Mr Adam that are contained in the supplementary file of documents provided by the respondent.

9.13 The claimant also states that the Darlington manager informed her that the respondent did not employ any managers. Mr Adam denied that. As he explained, he only attends the store once every two weeks and the director

only once every six months so they need a manager, “there is no way we could have a store without someone in charge and it was you all the time”.

9.14 The parties are agreed that prior to the transfer of her employment to the respondent, the claimant’s role as manager of the coffee shop included tasks such as producing the accounts for the shop, preparing budgets, compiling the staff rota, monitoring stock, liaising with suppliers and ordering stock, undertaking banking of takings, approving annual leave, hiring and training staff and undertaking disciplinary proceedings in relation to staff. The issue between the parties is that claimant contends that after the transfer her role changed in that duties were removed from her and assigned to others. As to the production of the accounts, however, the claimant does not take issue with that task having been removed from her given that the respondent already had its own accountants to do the accounts for all its stores.

9.15 In response to questionnaires completed by five employees at the coffee shop (132 to 141) each of them stated, albeit using slightly different forms of words, as follows:

9.15.1 The claimant was in charge of the shop and made decisions. Three of the employees have, however, qualified their answer to the following effect: this did not apply if the claimant was off; executive decisions were made by the owner; the supervisor was also in charge and made decisions.

9.15.2 The claimant was responsible on the rota and approving holidays and days off.

9.15.3 The claimant (and not the new owner or area manager) authorised any holidays taken between the date of the transfer and the date of her resignation.

9.15.4 They would approach the claimant if they needed anything regarding their job or the store; albeit two employees referring also to approaching the supervisor and one employee referring also to approaching the area manager.

9.16 After the transfer the claimant continued to approve employee holidays. The claimant’s evidence was that such approval had actually been given by her at the beginning of the year in January by being what she referred to as “pre-approved”. I do not understand that concept as “pre-approved” would appear to be the same as ‘approved’ and with some rare exceptions all holidays are pre-approved. In any event, it is apparent from absence requests submitted by one employee to the claimant using the BrightHR app. on 12 May 2024 (104) and 4 June 2024 (105) that the claimant did approve holidays after the transfer, which were therefore not pre-approved in January. This is consistent with the employees’ answers to the questionnaires referred to above. The claimant’s evidence was that even if she did approve holidays, unlike the situation before the transfer, any approval given by her also had to go through Mr Adam. I reject that evidence

as it is not consistent with the documents before me; and it was denied by Mr Adam.

9.17 Additionally in relation to the BrightHR app., on 3 May 2024 the claimant was informed that an employee had updated her personal details (102) and on 8 May the claimant wrote to certain individuals including the respondent's director referring to herself as, "Sunderland Manager" (103). Likewise, in other correspondence from the claimant that is contained in the documents before me dated 26 and 29 March 2024 she has referred to herself as, "Sunderland Manager" (99 and 100). In answer to a question in cross examination the claimant confirmed that she "always did" that.

9.18 Also with regard to that BrightHR app., the claimant's evidence was that it was her app. that she maintained on her 'phone and that the respondent did not want it to be used. I accept the evidence of Mr Adam, however, that it belonged to the respondent, which paid the appropriate fee, and it would not have done that if it did not want it to be used. I also accept Mr Adam's evidence that it was the claimant, not the respondent, who authorised the supervisor to prepare the rotas using the BrightHR app.

9.19 With regard to ordering of stock and banking, the respondent's director sent an email to the supervisor on 24 April 2024 (101) as follows:

> "This email to confirm what you have discussed with Mr Adam about your role and the review
>
> I can confirm that you will be on 13 pound an hour from 1/4 and you will stay in full charge of stock ordering and Banking
>
> Thanks alot for your support

9.20 On the face of it, that email would appear to give credence to the claimant's evidence that certain of her managerial functions were removed from her. When I asked her about this, however, she clarified, "if I was in I would do it but if she was in we could both do it". This accords with Mr Adam's evidence that the claimant did stock ordering and banking but when she was not there the supervisor would, but as soon as the claimant was back she was in charge, the supervisor never did stock and banking on her own. Additionally, in relation to the above message from the director, the claimant wrote to the supervisor, "Strange how he thinks you were in full charge of banking and ordering but never mind like I said it's in my job role until he says different I will continue to do it xx" (C15). Two points are to be drawn from this comment, first, the words "never mind" suggest that the claimant is not particularly concerned about the supervisor doing ordering and banking; secondly, the phrase "I will continue to do it" indicates that she would continue to undertake those tasks of ordering and banking, which is contrary to her evidence that such tasks were taken from her and given solely to the supervisor. It is also contrary to the claimant's oral evidence that, "my duties were spread across the staff leaving me on the tills".

9.21 Similarly, on 3 April 2024 the claimant sent a message to the supervisor stating, “I need u to look at rota go on my laptop ….,” (C14). I am satisfied that she would not have had to do that if, as the claimant suggests, the supervisor was producing the rota.

9.22 The additional documents produced by the respondent in the period between the first and second days of the hearing are indicative of the claimant continuing to be manager of the Sunderland store including as follows:

9.22.1 On 18 March 2024 it was the claimant to whom Mr Adam sent a message to ask her to arrange a staff meeting the following Monday to address their concerns. In her reply to Mr Adam the claimant informed him that she had “no concerns” (R1).

9.22.2 On 25 March 2024 the claimant sent a message to Mr Adam that she had amended a rota to address a resignation from a new employee (R2).

9.22.3 On that same day she sent a further message to Mr Adam setting out the hours worked by herself and seven other employees including the supervisor (R2).

9.22.4 On 26 March 2024 the claimant informed Mr Adam that she intended to compare two suppliers in relation to orders, informed him that works experience was “all sorted”, asked if he still required details of receipts and banking and informed him, “I did next weeks rota too” (R3/4).

9.22.5 On 28 March 2024 Mr Adam sent a message to the claimant asking her to call a supplier’s driver. In her reply the claimant also asked him, “do u have all payslips for me to send girls please”, which Mr Adam forwarded to her (R5).

9.22.6 On 2 April 2024 the claimant notified Mr Adam of the previous week’s sales commenting that she thought they would have been “on par for previous week had we been not been shut on Sunday”. In that same message the claimant informed Mr Adam of the working hours of herself and six other employees including the supervisor, and reminded him that one employee was to receive maternity pay (R6).

9.22.7 On 8 April 2024 the claimant notified Mr Adam of the hours worked by herself, the supervisor and three other employees, and that two employees had each had five days holiday (R8).

9.22.8 On 10 April 2024 the claimant asked Mr Adam for the wage slips for everyone’s weeks’ pay, which he sent to her (R9).

9.22.9 On another occasion the claimant informed Mr Adam of the cash, sent him documents showing sales, informed him that she had contacted a supplier about a fridge that was “acting up” and still under warranty and asked him to send “new liability” which she would print for the front of the store (R10).

9.22.10 On 11 April claimant informed Mr Adam that an employee was leaving and that she had a few applications and would take two on (R11).

9.22.11 On 14 April claimant informed Mr Adam of hours worked by herself, the supervisor and four other employees, and that one employee had five days' holiday. That same day she informed him of the week's sales (R12).

9.22.12 On 17 April Mr Adam asked the claimant what she thought of a new menu board to which she responded that it was expensive for Sunderland. Mr Adam agreed and commented, "we will do our own price list" (R13).

9.22.13 On 18 April the claimant informed Mr Adam of hours worked by herself and five other employees, including the supervisor, holidays taken by two employees and that one employee needed two weeks' maternity. That same day she enquired about her salary increase and the supervisor's increase (R14/15).

9.22.14 On 23 April 2024, the claimant sent Mr Adam staff rotas for the following week commenting "staff will be sent home if quiet though" (R17).

9.22.15 On 29 April 24 the claimant again notified Mr Adam of hours worked by herself and other employees, including the supervisor (R18).

9.22.16 On 30 April the claimant informed Mr Adam, "I been called out of work to be by my dad's side i left the 3 girls in and I am on my phone for any issues" (R20).

9.23 In relation to the above, Mr Adam's evidence was that the Whatsapp exchanges were only between him and the claimant. He said that he had never messaged other staff and had never been part of a group with the staff of the Sunderland store. There is no documentary evidence before me that contradicts that evidence of Mr Adam and I accept that evidence. I also accept Mr Adam's evidence that the claimant was the only person who had access to the BrightHR app. (except to the extent that she authorised the supervisor to have access) and had full unrestricted access to the respondent's emails.

9.24 More generally, the claimant's oral evidence was that rather than her being the manager, Mr Adam's opinion was that whoever opened the store was in charge that day. Similarly, her oral evidence was the while she and the supervisor were responsible for distributing payslips, "everything else was across-the-board"; by that she explained that if Mr Adam had any questions regarding rotas, suppliers etc, "any staff could answer". I do not find that evidence to be credible and it is not borne out by the messages between the claimant and Mr Adam that are contained in the supplementary file of papers submitted by the respondent. On this point I asked the claimant if she had provided any documents in support of her answers that other staff

could deal with Mr Adam's questions. She answered that she had not as she did not think it would be relevant.

9.25 The claimant had conduct of a disciplinary matter in relation to the attitude and conduct of the shop supervisor in June 2024. Mr Adam supported her in this regard and told her to do as she saw fit – she was responsible for hiring and dismissing staff and if she wanted to sack the supervisor she could. The claimant took advice from the respondent's external HR advisers and in accordance with the advice given had intended to hold a disciplinary meeting with the supervisor on 5 June 2024 and give her a second verbal warning. In advance of the meeting the claimant had prepared a letter to give to the supervisor (106). Although it had been prepared in advance, the letter purported to be a record of the meeting: for example, it began, "I have held a meeting today …."; it noted that both complaints, "have been discussed today"; it stated that "Following the Meeting" the supervisor had been given a "Second Verbal Warning". Confusingly, the letter is dated 5 June 2024 on the first page and 6 June 2024 on the second page, and refers to the warning remaining on the supervisor's file, from "today's date 6 June 2024". It is signed by the claimant as, "Sunderland Manager". When, however, the claimant invited the supervisor to go to the office for these purposes she left work saying that she was sick.

9.26 The supervisor returned to work on 11 June 2024, which provided the claimant with the opportunity to progress the disciplinary proceedings; as she put it in oral evidence to "execute" the letter that she had prepared. The claimant went to the office with Mr Adam and the supervisor followed them up. The claimant handed the letter to Mr Adam who noted its content, that it bore the incorrect date and, particularly, that it referred to the supervisor having been disciplined. The supervisor informed Mr Adam that she had not had a disciplinary meeting. The claimant's evidence was that she was in the adjacent tearoom at the time and could hear Mr Adam and the supervisor laughing. Then, when she went into the office Mr Adam had clapped his hands and said words to the effect, "You haven't dealt with it. You said you would, it's laughable". Her oral evidence continued that that incident was the 'last straw' that led to her resignation. She answered in cross examination that she could not take the mockery anymore and confirmed that that had impacted on her mental health. She agreed that there could have been a decline in her mental health as a consequence of the death of her father but only, "partially not 100%".

9.27 In oral evidence Mr Adam accepted that he had been surprised that the claimant had not progressed the disciplinary matter as she had said she would and that he had challenged the claimant about the written record that she had produced of a meeting that had not occurred but he denied that he had mocked the claimant in this regard.

9.28 The claimant submitted her resignation by letter dated 11 June 2024. In that letter she explained that she was resigning "due to the Job Role no longer been available when I was carried over under Tupe law". She also referred to the following: having been informed by both Mr Adam and the supervisor that there was no manager role; her salary had not been correct and had

been consistently reduced since the transfer; not having been supported in relation to her father's illness or allowed to grieve due to being unable to afford the constant loss of earnings; she could not work for someone who constantly told her that she was "of no worth" or she could not do simple things like rotas or train staff; although disappointed and saddened at her decision she felt "pressured into walking away for my mental health" (108). It is to be noted that the claimant did not refer to the incident on 11 June 2024 (as recorded above) upon which she relies as being the 'last straw'.

Submissions

10. After the evidence had been concluded Ms Richards and the claimant made submissions. It is not necessary for me to set out those submissions in detail here because they are a matter of record and the salient points will be obvious from my findings and conclusions in this Judgment. Suffice it to say that I fully considered all the submissions made, together with the statutory and case law referred to, and the parties can be assured that they were all taken into account by me in coming to my decision.

11. That said, the key points made by Ms Richards on behalf of the respondent included as follows:

11.1 By reference to the decision in Kaur v Leeds Teaching Hospitals NHS Trust, the most recent act must cause the resignation and must be itself repudiatory or part of a course of conduct and the employee must resign in response or part response to the breach. In this case the respondent does not accept there was a breach and relies upon the decision in Hilton v Shiner.

11.2 There is no evidence that the claimant's role was reduced having transferred under regulation 4 of TUPE. On the contrary, the evidence is that the claimant returned to her role, approved holidays, had access to the store email and social account, conducted disciplinary procedure and undertook other extensive managerial duties. The only change was the increase in her pay to £27,625.

11.3 It is accepted that the supervisor was paid a higher hourly rate but she worked a lower number of hours. Nobody was paid more than the claimant who could have chosen as many or as few hours as she wanted to work and approved her own overtime, but even on her contractual hours she earned more than anyone else.

11.4 The claimant had failed to evidence that the resignation was caused by any breach. It could well be a decline in her mental health that was likely caused by her grief. It was prompted by the respondent uncovering that the claimant had followed an incorrect disciplinary process. She was likely embarrassed by her dishonesty and resigned rather than face disciplinary action. Her resignation was not in response to the allegations she had made that she no longer had a managerial role, which had been taken by the supervisor, and did not receive the correct pay. She continued to work and only resigned when she was found to have incorrectly performed the disciplinary process.

11.5 The claimant's evidence had been contradictory and evolved on the spot: for example, that there was no manager and then that the supervisor was given managerial duties.

12. The key points made by the claimant included as follows:

12.1 Everything had to go through Mr Adam such as the rotas and suppliers. I had to sit the supervisor down to get the passwords from her. The laptop was taken off me and the office was taken off me. My role was no longer there. I was a ghost in my own shop where I had worked for 16 years.

12.2 Mr Adam said that I would get extra pay but it was hourly, and I did not agree to the supervisor getting extra pay. I worked 42.5 hours a week but it was difficult to get them in. I stayed many extra hours. I was never on a rota because I was salaried.

12.3 I had many conversations with Mr Adam. I went to the director but he shut me down. Mr Adam and the supervisor said that the email was fabricated and they laughed at me.

12.4 Mention had been made of my mental health but I had no time off due to my Dad's sickness over two years apart from one week.

12.5 I would not walk out of a job that I was the full breadwinner of for my family.

The Law

13. The principal statutory provisions that are relevant in this case (with some editing so as to be relevant to the claimant's complaints) are as follows:

Unfair dismissal – Employment Rights Act 1996

*"**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.

…….

(4) Where the employer has fulfilled the requirements of subsection (1), 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."

Consideration – application of the facts and the law to determine the issues

14. The above are the salient facts and submissions relevant to and upon which I based my Judgment having considered those facts and submissions in the light of the relevant statutory law and the case precedents in this area of law.

15. As in any case involving a claim of constructive unfair dismissal, the first question is whether there was a dismissal at all. As mentioned above, the claimant relied on section 95(1)(c) of the 1996 Act that she resigned in circumstances where she was entitled to do so by reason of the respondent's conduct; commonly referred to as constructive dismissal.

16. The decision of the Court of Appeal in Western Excavating (ECC) Limited v Sharp [1978] IRLR 27 has stood the test of time for approaching 50 years. It is well-established that to satisfy the Tribunal that she was indeed dismissed rather than simply resigned, the claimant has to show four particular points as follows:

16.1. The respondent acted (or failed to act) in a way that amounted to a breach of the contract of employment between the respondent and the claimant.

16.2. If so, that breach went to the heart of the employment relationship so as to amount to a fundamental or repudiatory breach of that contract.

16.3. If so, the claimant resigned in response to that breach.

16.4. If so, the claimant resigned timeously and did not remain in employment thus waiving the breach and affirming the contract.

A repudiatory breach?

17. I first address the first two of the above points of whether there was a breach of contract and, if so, whether it amounted to a fundamental or repudiatory breach.

18. To establish the required breach of contract, the claimant relies, first, upon a breach of the express term of her contract of employment that she would be paid the full

salary that was due to her and, secondly, upon a breach of the term implied into all contracts of employment that the parties will show trust and confidence, the one to the other. I shall address each of those alleged breaches in turn.

Breach of the express term

19. As recorded above, at the time that the claimant's employment transferred to the respondent she was paid a salary of £25,200 per annum and, as she was employed for 42.5 hours each week, that equated to £11.40 per hour.

20. To pay an employee the full amount earned from work done is an essential term of any contract of employment. In Cantor Fitzgerald International v Callaghan [1999] ICR 639 CA it was held that in a contract of employment the terms agreed as to pay are of crucial importance and that if an employer unilaterally deliberately refuses to pay what is due the entire foundation of the contract of employment is undermined and will normally be regarded as repudiatory regardless of whether the amount in issue was very great. The Court of Appeal noted that different considerations might apply if the employer had inadvertently failed to pay or delayed the payment to the employee but if there was a deliberate and determined refusal to pay it would wholly undermine the contract of employment and constitute a repudiatory breach: see also R F Hill Ltd v Mooney [1981] IRLR 258 EAT.

21. In this case, the situation as to precisely what was paid to the claimant is confused by a number of factors. These include the following: first, rather than the claimant simply being paid the appropriate fraction representing two weeks or one month of her annual salary, that salary was converted into hourly pay; secondly, in relation to the month of March 2024, which is the principal area of dispute between the parties, the respondent was only responsible for the claimant's pay from 5 March 2024. Despite that confusion, however, I found the evidence given by Mr Adam in this respect to be clear and persuasive. I accept that evidence that in that month of March 2024 the claimant worked for 25 days and received a total of £1,835.40, which equated to £25,200 per annum.

22. Further, Mr Adam was equally clear that after the respondent increased the claimant's salary to £27,625 from 1 April 2024 she was paid that salary in full.

23. In this regard, I consider the record in the transcript of grievance referred to above (which the claimant relied upon as her witness statement) to be significant. In that transcript the claimant clearly stated, "I don't mind being on a low pay because it's still a salary and I still have a mortgage to, and so legally I can't do anything about that, but morally, a supervisor above a manager is just, it's soul destroying". I regard as especially significant the claimant's phrase, "I know legally he hasn't dropped my salary".

24. I accept the above evidence. On that basis I am satisfied that the respondent did not breach the express term of the claimant's contract of employment that she would be paid an annual salary of £25,200 or £27,625 as the case may be.

25. Related to the amount of salary paid to the claimant is the issue of the respondent having changed the basis of her pay from annual salary to hourly. In that regard, I consider it to be equally significant that the claimant expressed herself to be "quite happy" with that change. If that constituted a variation to her contractual terms, I am satisfied that the

claimant thus agreed to that variation; alternatively, if that variation amounted to a breach of her contract, I am satisfied that she waived that breach.

Breach of the implied term

26. Turning to the asserted breach of the implied term of trust and confidence, as was said in Woods v WM Car Services (Peterborough) Limited [1981] IRLR 347,

> *"… it is clearly established that there is implied in a contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee …. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract: the Tribunals' 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 …. The conduct of the parties has to be looked at as a whole and its cumulative impact assessed."*
>
> *"… the conduct of the employer had to amount to repudiation of the contract at common law. Accordingly, in cases of constructive dismissal, an employee has no remedy even if his employer has behaved unfairly, unless it can be shown that the employer's conduct amounts to a fundamental breach of the contract."*
>
> *"Any breach of that implied term is a fundamental breach amounting to a repudiation since it necessarily goes to the root of contract."*

27. It is clear from the final paragraph in the above excerpt that with regard to the second of the above factors in Western Excavating (ECC) Limited, in general terms, a breach of the implied term of trust and confidence "will mean, inevitably, that there has been a fundamental or repudiatory breach going necessarily to the root of the contract": see Morrow v Safeway Stores plc [2002] IRLR 9 applying the decision in Woods.

28. The decision in Malik v BCCI [1998] AC 20 is summarised by Hale LJ in Gogay thus:

> "*This requires an employer, in the words of Lord Nicholls of Birkenhead in Malik v BCCI [1998] AC 20, at p 35A and C,*
>
> *'. . . not to engage in conduct likely to undermine the trust and confidence required if the employment relationship is to continue in the manner the employment contract implicitly envisages. . . . The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer'. Lord Steyn emphasised, at p53B, that the obligation applies 'only where there is "no reasonable and proper cause" for the employer's conduct, and then only if the conduct is calculated to destroy or seriously damage the relationship . . . '"*

29. It is also well-established that, "the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of the contract of employment": see Lewis v

Motorworld Garages Limited [1985] IRLR 465. In this case the claimant relies upon such cumulative conduct on the part of the respondent and what is sometimes referred to as the 'last straw' doctrine. This was explored in Omilaju v Waltham Forest London Borough Council [2005] ICR 481, CA in which it was said of a final straw as follows:

> "*it should be an act in a series whose cumulative effect is to amount to a breach of the implied term…. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant*."

30. The last straw can, however, itself be sufficient to be a repudiatory breach (Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978).

31. The issues in this case, as I have set them out at paragraph 7 of these Reasons reflect the guidance that I draw from the above authorities.

32. In the above context, I turn to consider the matters relied upon by the claimant as amounting to a breach of the term of trust and confidence that is implied into all contracts of employment. In this regard I repeat that, as stated in the decision in Lewis as set out above, it is immaterial if those matters in themselves might be quite trivial if they cumulatively amount to a repudiatory breach of contract.

33. My findings in relation to the various matters relied upon the claimant are recorded above and need not be repeated here. For ease, however, I have summarised below the principal allegations made by the claimant upon which she relies in respect of this claim and my key findings in relation to each of those allegations.

Non-payment of full salary

34. I have dealt with this above. I am satisfied that the respondent did pay to the claimant her full annual salary.

Managerial tasks removed

35. I have set out above the key elements of the evidence before me that I have brought into account in this respect, on the basis of which I am not satisfied that the claimant's managerial tasks were removed. I will not repeat those elements here but they include the following:

35.1 The responses to questionnaires completed by five employees at the coffee shop.

35.2 The claimant continuing to approve staff holidays.

35.3 The claimant continuing to refer to herself in correspondence as the Sunderland Manager.

35.4 The exchange of messages between Mr Adam and the claimant contained in the supplementary file of papers provided by the respondent from which I am satisfied that the claimant continued to perform the following tasks:

35.4.1 preparing staff rotas (and in this respect, having the authority to send the staff home if the store was quite);

35.4.2 submitting to Mr Adam details of hours worked by staff and other matters such as their holidays, maternity entitlement and resignation (and in this respect her submitting the hours worked by the supervisor rather than the supervisor submitting the hours worked by the staff or at least her own hours);

35.4.3 interviewing and appointing new staff;

35.4.4 obtaining from Mr Adam payslips, which she distributed to the staff;

35.4.5 advising Mr Adam of sales figures;

35.4.6 considering the suitability of suppliers and submitting orders;

35.4.7 having conduct of a disciplinary process;

35.4.8 offering her availability to deal with issues even when being summoned to be with her father

36. I am further satisfied that the claimant continued to undertake the banking of takings, was the only person who had access to the BrightHR app. (except to the extent that she authorised the supervisor to have such access) and had full unrestricted access to the respondent's emails.

37. Finally, I am satisfied that it was the claimant who was primarily responsible for the above tasks when she was working and, as recorded above, reject her contention that any employee could undertake these managerial tasks.

38. I also reject the claimant's evidence that Mr Adam had to approve rotas, holiday and orders, indeed, "everything I did he had to approve" as that evidence is contrary to the documents before me and was denied by Mr Adam.

39. In this connection, there is no corroborative evidence before me that supports the claimant's account that, after the transfer of the business, everything was across-the-board and "any staff could answer" Mr Adam's questions regarding rotas, suppliers etc; and Mr Adam was of the opinion that whoever opened the store was in charge that day.

The 'last straw'

40. The claimant and Mr Adam both gave clear evidence of what occurred between them on 11 June 2024 when she gave him the letter that recorded the meeting between her and the supervisor such that it is difficult to be certain of precisely what took place. What is clear, however, is that the letter was inaccurate and caused Mr Adam to be surprised and no doubt frustrated and disappointed that the claimant had not dealt with the supervisor as she had said that she would. I am satisfied that he might well have said

that it was “laughable”, as was the claimant’s evidence, but, on the basis of the evidence before me, I am not satisfied that what Mr Adam said and did that day amounted to “mockery”.

41. As recorded above, the claimant relies upon this incident as the ‘last straw’ that entitled her to resign and claim to have been dismissed. I repeat that in the decision in Omilaju it was said that the final straw should be an act which, when taken in conjunction with the earlier acts on which the employee relies, amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant. In this case, the reasons I have set out above, the claimant has failed to satisfy me that the earlier acts on which she relies, whether taken separately or together, constituted a breach of the implied term of trust and confidence and, therefore, there is nothing to which what occurred on 11 June 2024 can contribute.

42. I consider it to be significant that in her resignation letter the claimant did not make any mention whatsoever of what she says occurred on 11 June 2024, which it is reasonable to assume she would have done if that incident was the ‘last straw’ that led to that resignation.

43. It is also significant that the claimant did not question Mr Adam at all about what occurred between them on this date or, importantly, challenge his account of what occurred as contained in his witness statement; that in the context that in relation to her questions in cross examination I did inform the claimant that if she did not question Mr Adam about anything in his statement with which she disagreed, the respondent would invite me to accept his evidence on the basis that it was unchallenged.

44. There is no doubt that the claimant considered that her role as manager was eroded after the transfer of the business to the respondent, and she bears a considerable sense of grievance about that but, on the evidence available to me I find that she has failed to discharge the burden of proof upon her to establish that.

Summary

45. In summary, on the basis of the evidence before me, both oral and documentary, I am satisfied that with the exception of production of the accounts (with which the claimant does not take issue) she continued with her key managerial tasks of compiling the staff rota, monitoring stock, liaising with suppliers and ordering stock, undertaking banking of takings, approving annual leave, hiring and training staff and undertaking disciplinary proceedings in relation to staff.

46. In the above circumstances, adverting to the decision in Western Excavating (ECC) Limited, the claimant has failed to satisfy me that the respondent acted (or failed to act) in a way that amounted to a breach of the contract of employment between it and the claimant and to the extent that there might have been some issues between the respondent and the claimant she has failed to satisfy me that any breach that there might have been went to the heart of the employment relationship so as to amount to a fundamental or repudiatory breach of that contract.

47. In the absence of any breach, it is unnecessary for me to go on and consider the third and fourth points arising from that decision in Western Excavating (ECC) Limited as I have expressed them above.

48. In conclusion of this complaint, the question in issue is whether, applying the approach of Lord Steyn in Malik, the respondent's conduct,

44.1. first, destroyed or seriously damaged the relationship of trust and confidence and,

44.2. secondly, was without reasonable and proper cause.

As Lady Hale noted in Gogay v Hertfordshire County Council [2000] IRLR 703 CA, "The test is a severe one". I explained this to the claimant at the commencement of the hearing in terms that it was a "high hurdle to clear" and I am not satisfied that she has done so.

49. For the reasons set out above, I am satisfied, as to the first two factors in Western Excavating (ECC) Limited as I have referred to them above that the conduct on the part of the respondent did not constitute a breach of the contract of employment between it and the claimant amounting to a fundamental or repudiatory breach of that contract.

50. In simple terms I am not satisfied that the claimant's resignation constituted a dismissal and it follows, therefore, that her complaint of unfair dismissal cannot be well-founded and is dismissed.

JUDGMENT APPROVED BY
EMPLOYMENT JUDGE MORRIS
ON 25 January 2025

Note

Public access to employment Tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-Tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.