



EMPLOYMENT TRIBUNALS

Claimant: Mrs C Davis
Respondent: Rispins Foodmarket
Heard at: Hull **On:** 29 November 2018
5 February 2019

Before: Employment Judge Martin

Representation

Claimant: In person
Respondent: Mr C Rispin (owner of respondent business)

RESERVED JUDGMENT

The Judgment is that the claimant's complaint of unfair dismissal is not well founded and is hereby dismissed.

REASONS

1. The claimant and her mother Mrs Newman gave evidence on behalf of the claimant. Mr Charles Rispin (owner of the respondent company), Mr Stephen Casey, manager and his wife Mrs Emma Casey, supervisor all gave evidence on behalf of the respondent.
2. The Tribunal was provided with two bundles of documents one from the claimant and one from the respondent and were respectively marked C1 and R1.

The law

3. The Tribunal considered the following law :-
4. Section 95(1)(b) of the Employment Rights Act 1996 “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 a reason of the employer’s conduct”. Section 111(2) Employment Rights Act 1996. The Employment Tribunal shall not consider a complaint (for unfair dismissal) unless it is presented to the Tribunal:-
 - (a) Before the end of the period of three months beginning with the effective date of termination.
5. Section 207B(2) Employment Rights Act 1996.
 - (a) Day A is the day on which the complainant or applicant concerned complies with the requirement to contact ACAS before instituting proceedings in relation to the matter in respect of which the proceedings are brought and Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving the Certificate issued by ACAS
6. Section 207B(3) in working out when a time limit set by a relevant provision expires the period beginning with the day after day A and ending with day B is not to be counted.
7. Section 207B(4) time limits set by a relevant provision would (if not extended by this sub-section) expire during the period beginning with day A and ending one month after day B, the time limit expires instead at the end of that period.
8. The well-known case of **Western Excavating (ECC) Ltd v Sharp** [1978] IRLR 27 where the Court of Appeal held as cited by Lord Denning – an employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once.
9. The case of **Woods v W M Car Services (Peterborough) Ltd** [1981] IRLR 347 where the EAT held that it is implied in a contract of employment a term that the employer will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. Any breach of this implied term is a fundamental breach amounting to a repudiation since it necessarily goes to the root of the contract. The Employment Tribunal's function

is to look at the employer's conduct as a whole and determine whether its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.

7. The case of **Nottinghamshire County Council v Meikle** [2004] IRLR 703 where the Court of Appeal held that, once the repudiation of the contract by the employer has been established, the proper approach is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end.

10. The case of **W E Cox Toner (International) Ltd v Crook** [1981] IRLR page 443 where the EAT held that if one party commits a repudiatory breach of contract, the other party can choose either to affirm the contract and insist on its further performance or he can accept the repudiation, in which case the contract is at an end. The innocent party must at some stage elect between these two possible scenarios:- If he affirms the contract, his right to accept the repudiation is at an end. The employee who accepts his next pay packet (ie further performance of the contract by the guilty party) runs the risk of being held to affirm the contract. That risk usually involves further performance of the contract by both parties. The employee must make clear his objection to what is being done otherwise he is potentially taken to affirm the contract by continuing to work and/or draw pay for a limited period of time, even if the purpose is merely to enable him to find another job. The employee must make up his mind soon after the conduct of which he complains. If he continues for any length of time without leaving, he will lose his right to treat himself as discharged.

11. The case of **Bournemouth University Higher Education Corporation v Buckland** [2010] ICR 908 where the Court of Appeal held as cited by Lord Justice Sedley a wronged party, particularly if it fails to make its position clear at the outset, cannot ordinarily expect to continue the contract for very long without losing the option of termination.

12. The case of **Tullett Prebon Plc and Others v BGT Brokers & Ors** [2010] EWCA 486 where Mr Justice Jack held that, where there is an allegation of breach of the term of trust and confidence, the employee's behaviour may be relevant whether the employer's conduct is sufficient to discharge the trust and confidence of the employee and therefore amount to a breach of contract.

The issues

13. The issues which the Tribunal had to consider was whether the claimant was dismissed or whether she resigned.

14. If she resigned whether she resigned because of a breach of contract on the part of the respondent.

15. The Tribunal had to go on to consider whether that was a fundamental breach of an express term or of the implied term of trust and confidence.

16. The Tribunal had to identify what was the breach or breaches and consider whether that was the principal reason for the claimant's resignation.

17. Finally the Tribunal had to consider whether the claimant affirmed the contract of employment in the meantime.

Findings of fact

18. The respondent is a small family run food retail outlet. Mr Charles Rispin is the owner. He is semi-retired. Mr Steve Casey is the manager. He is the husband of Emma Casey, who was the claimant's best friend from school. Mrs Casey's brother also worked for the respondents.

19. The claimant worked for the respondent as a shop assistant. She sometimes acted up as supervisor when Mr and Mrs Casey were on leave.

20. The claimant commenced employment with the respondents in 2010.

21. In April 2011 the claimant left the respondent company. In evidence she said that she understood that she was on maternity leave. She said that she had asked Mr Rispin about maternity pay but had been told that she was not earning enough to receive maternity pay and that she should apply for statutory maternity allowance. She left to have her third child shortly afterwards.

22. She subsequently returned to work for the respondent in March 2012. She went back to the same job and the same days and hours.

23. The respondent suggested during the course of the hearing that the claimant had left off her own accord in April 2011. Mr Rispin and Mr Casey said that the claimant had considered whether to leave when she was pregnant and indicated that she wasn't sure if she wanted to carry on working. They said that the claimant was issued with a P45 and was allocated a different employee number. Mr Rispin referred to the claimant's contract of employment which is in the respondent's bundle. It was issued in October 2012. It states that no previous period of employment will count as employment. The contract was issued six months after the claimant re-joined the respondent on a new contract. The contract is signed by the claimant. The respondent says it was simply a coincidence that the claimant's hours of work were the same. He said that another employee had just left before the claimant returned.

24. The claimant on the other hand said in evidence to the Tribunal that the first time she was aware that the respondents were suggesting she had left her employment voluntarily in April 2011 was during the course of these proceedings when she was sent the P45 as part of the respondent's bundle of documents. The first date on the P45 is April 2011 – the date that the respondent say the claimant left. However, it is dated as issued on 28 August 2018. The respondent said in evidence that was the date which it was printed. The claimant said that she never received the P45. She said she would not have known whether she had a different employee number. The claimant's evidence was that she would not have left her employment as she knew she could take maternity leave which was what she understood she was taking at that time.

25. The respondent said in evidence that they had policies dealing with grievances and disciplinary procedures. However no policies of any kind were produced before this Tribunal.
26. The respondent said that concerns were raised about the claimant's behaviour on a number of occasions by other employees. The respondent says that in March/April 2017 a grievance was raised by another employee called Chantelle about the claimant's behaviour. They say a form of grievance procedure was followed and the matter was resolved. The claimant said that the matters were not resolved, but she carried on working with Chantelle and worked things out. The respondent says that Mrs Casey's brother also raised a concern about the claimant when she was acting up as supervisor in the summer of 2017 when Mr and Mrs Casey were on leave.
27. The respondent said in evidence that a number of employees raised concerns that the claimant was being treated more favourably than other employees particularly with regard to holidays and shift changes.
28. The respondent say that the claimant looked to take all her holiday for the last holiday year of her employment during the summer. The claimant said that she needed time off to look after her children during the summer and that other staff without children would agree to change their shifts.
29. An issue arose when the respondent said that some staff had complained that the claimant was trying to change her shifts over the Christmas period in 2017. The claimant said that she was trying to take a couple of hours off for the two days that she worked that week because she wanted to spend some time with her mother-in-law who was dying of cancer. The respondent said that Mrs Casey's brother's partner was also dying of cancer and that they wanted to be fair to all the staff.
30. An incident arose on 22 November 2017 when the claimant was helping with moving some pallets. The claimant said she started having problems with her back and asked to take her break early. The break was usually taken at 10am. The claimant says that Mr Casey who was working with her acted in a patronising manner. He indicated that he and other staff had worked more hours and were more in need of the break than the claimant who had only been working for a short period. The claimant said that he then said that she wasn't entitled to a break for six hours. The claimant said that the issue about her having some time over Christmas to spend with her dying mother-in-law then arose and Mr Casey said that she wasn't going to get the time off.
31. In his evidence Mr Casey said that he did say the claimant couldn't take the break at that time and did refer to what some other employers did regarding entitlement to breaks namely only after an employee had worked six hours. He said he wasn't aware the claimant had a bad back, but that if she had she could have worked on the till. He said the claimant started to raise the issue about time off and then said that she was going to leave early the next day anyway because she had problems with childcare.

32. It is clear that this discussion escalated into an argument. In evidence the claimant admitted that she was shouting but she said that she was shouting to defend herself. She also admitted that she then walked off the premises.
33. The claimant sat in her car for about half an hour and then returned. She telephoned Mrs Casey during that time, who persuaded her to come back.
34. In relation to this incident Mrs Casey said that she had heard some banter and that the situation was escalating during the discussion. Voices were being raised. Mrs Casey said that she didn't hear all the discussion. She moved away as she did not want to get involved.
35. It appears that the claimant and Mrs Casey do not have a particularly good relationship. Mrs Casey would feel that sometimes she was caught in the middle. It appears that she tried not to get involved in any issues between the two of them and sought to do that on this occasion.
36. The claimant said that when she returned she had her break and then worked her shift and kept out of Mr Casey's way.
37. The claimant said that Mr Casey sent a message at lunchtime through the WhatsApp group about shift changes saying that they had to be authorised by him. The claimant said that she felt that this was directed at her following the earlier argument that morning and she left the WhatsApp group.
38. The claimant said that Mr Casey then sent a colleague shortly afterwards to call her into the office which she initially refused to do.
39. Mr Casey said that he arranged for someone to bring the claimant into the office. In doing so he said he was trying to resolve the situation after what happened in the morning. He said that he wanted to give the claimant an opportunity to calm down first. He took the view that the claimant had stormed off in the heat of the moment.
40. The claimant says that she was then called into the office by Mr Casey. She said that Mr Casey was angry and intimidating and was raising issues about holidays. He even referred to her not looking after their daughter. She said that he also raised the issue about her asking for a reference for a cleaning job which she said she intended to undertake as well as her job at the respondents.
41. Mr Casey said that he called the claimant in to his office to try and resolve matters. He said that the claimant refused to come into his office. Mr Casey said that he and Mr Rispin had concerns for some time that the claimant had not been helping out as much in the business as she had done before and was losing interest in her job. He said that he started discussing the issue about the claimant taking time off at Christmas and that the claimant then started shouting, screaming and swearing at him. He said that he did not shout or swear. He said that the claimant raised an issue about looking after his daughter and started getting personal. Mr Casey said in evidence that he then tried to end the meeting a number of times and he sat down to try and work at his computer. The claimant said in evidence that she felt that Mr Casey then started to ignore her. In evidence before the Tribunal the claimant

admitted that she did shout and swear at Mr Casey. She said that Mr Casey was provoking her and that she was just defending herself. The respondents said that they had written statements from other staff saying they could hear the claimant shouting and screaming, none of whom attended to give evidence before this Tribunal.

42. The claimant went back to undertake the rest of her shift. When Mr Rispin telephoned the shop later, she asked if she could meet him to talk to him about Mr Casey. She said that she gave him brief details about what happened and he said that he would discuss the matter with Mr Casey.
43. Mr Casey also said that he raised the matter with Mr Rispin.
44. On that same day, 22 November 2017, the claimant sent a text message to Mr Rispin asking if she could have a meeting with him without Mr Casey. She said that she was very upset and felt that she had been driven out of work by Mr Casey. She wanted to discuss how she felt without Mr Casey knowing that she had spoken to Mr Rispin.
45. She followed this message up with a further text on the following day. She asked Mr Rispin if he was coming back into the shop the next day and whether she could then have a meeting with him. She indicated that she felt that she didn't want to be at work. Those texts are at page 5A of the bundle.
46. The claimant carried on working at the shop. She swapped shifts, so she worked a different shift at the end of November. She said she did not work with Mr Casey on that day.
47. The claimant was due to return to work her usual shifts on 27 November 2018. She went to see her doctor and was signed off with low mood. She was signed off for eight days until 4 December (page 2 of the bundle).
48. The respondent said in evidence that they were considering how to deal with the claimant's behaviour on 22 November 2017. Mr Rispin said in evidence that he would be looking to investigate the matter and then proceed to a disciplinary hearing. However the respondent did not actually take any action to start any investigation into the matter or instigate the commencement of any disciplinary proceedings. They did not contact the claimant at all in that regard. Mr Rispin said that he did not do so because the claimant was off sick at the time and he expected her to return.
49. The claimant sent Mr Rispin a further text message on 4 December 2017 when she indicated that she didn't know whether she was ready to return yet and indicated that a big thing that was stopping her was about how she would feel about returning. She expressed concern about the fact that she had reached out for some support but didn't get any response. That made her even more upset and uncomfortable. (page 5A of the bundle). Mr Rispin responded to that text to indicate that he did not consider that social media was the correct place to sort out employment matters. The claimant responded to that and asked whether he would call her (page 5A of the bundle).

50. Mrs Casey the supervisor kept in touch with the claimant but she did this both as her friend and as the supervisor. She indicated in evidence that she felt she was in a very difficult position as she was the claimant's friend and in regular contact with her in that capacity. She was also Mr Casey's wife and the issue was between them two. She made it clear both on the telephone and in text messages to the Claimant that she did not want to get involved in the matter but was trying to support the claimant.
51. Mrs Casey indicated that she thought that the matter would have to be resolved when the claimant came back and that the claimant would be attending a return to work meeting (page 4d of the bundle). The claimant complained to Mrs Casey about the fact that Mr Rispin had not set up a meeting, but Mrs Casey indicated on a number of occasions that she thought that Mr Rispin would have a meeting with her when she came back. She talked about it being a back to work meeting. The claimant indicated that she was concerned that she hadn't just been off because she was sick but because of what happened (page 4d of the bundle).
52. By early January the claimant was asking what was going on and Mrs Casey indicated that she believed that a return to work meeting would take place. She also indicated that she didn't want to get involved in the matter. She was checking to see how the claimant was feeling.
53. The claimant did not go into the shop at any stage during her sick leave to collect her pay slips.
54. The claimant's sick leave was extended. She obtained a further sick note on 4 December which was for a further seven days until 11 December (page 2c). She then obtained another sick note again for a further 8 days until the beginning of January 2018. She continued to receive sick notes approximately every couple of weeks indicating that she was suffering from low moods during January and February (page 2c-f). Towards the end of January it was indicated that she was suffering from depression. She was issued with a sick note for seven days (page 2g). She continued to receive sick notes from 29 January for depression/bereavement in the family again for a further two weeks (page 2h); and then for a further 10 days on 12 February until 21 February (2i); and throughout February into early March and then mid-March (2j and k).
55. Mr Rispin said that the claimant did telephone him a couple of times but he indicated that he would meet with her when she returned to work.
56. Mr Rispin said in evidence that he did not want to contact the claimant as she was on sick leave but intended to deal with the matter on her return.
57. He said that the supervisor Emma Casey was keeping in touch with the claimant during the claimant's sickness absence. However, he did not appear to fully appreciate the difficulties with the support from work being provided by Mrs Casey bearing in mind the relationship between the two of them and the incident which had occurred between the claimant and Mrs Casey's husband. Mr Rispin was certainly not proactive in managing the claimant's sickness absence. The respondent did not arrange any meetings with the

claimant to review her absence or attempt formal contact with her other than through Mrs Casey who although she was her supervisor was also her friend.

58. Mr Rispin said that he was not intending to deal with the matter until the claimant's return. Mr Casey did not deal with the matter as he was involved in the incident.
59. Mr Rispin said that he did not think it was appropriate to deal with the matter over the telephone or by text and was going to deal with it properly at a meeting when the claimant returned. He said that he didn't expect that the claimant wouldn't be coming back.
60. The claimant received sick pay during the entire period of her absence.
61. The claimant said in evidence to the Tribunal that she realised by about early January that Mr Rispin would not be in contact with her and she did not think that things would be resolved so she started looking for work elsewhere.
62. The claimant was offered work as a dinner supervisor. She said that Mr Casey supplied a glowing reference which was provided on about 11 January 2018. She said that there was a delay in her starting as they were waiting for a CRB check.
63. The claimant said that she actually started work on 5 March 2018. She said she then resigned her employment with the respondents on 11 March 2018.
64. She sent an email to the respondent on 11 March 2018 resigning from her employment. She stated that, due to the incident involving herself and Mr Casey and having had no support from Mr Rispin which she said created a lengthy period of sickness and medication due to depression that she did not feel able to return to work. She indicated that she was resigning with effect from 15 March (page 15a).
65. The respondent replied to her email and accepted her resignation on 13 March (page 15a of the bundle).
66. The claimant had obtained another job by then as a dinner lady and had commenced that employment. She said in evidence to the Tribunal that she resigned when she obtained that job but would not have sought that other employment if she had not lost trust and confidence in the respondent. However it appears from her evidence that she had lost trust and confidence in her employer some months earlier, namely in early January when she concluded that it appeared that matters would not be resolved and at that stage she had started looking for another job.
67. The respondent said that the claimant could have done the job as a dinner lady as well as continuing to work for the respondents on different hours.
68. The claimant then subsequently applied for another job in retail. She was concerned because she received a poor reference from the respondent which she said differed from the first reference. Mr Casey said the second reference was by telephone. He said that the only real difference was that he indicated that he would not re-employ the claimant because she had now left and had

been off sick for a period of time. He also indicated that she had absences due to sickness. The claimant was very upset by that reference.

69. The claimant made a subject access request. The respondent suggested that that involved them having to obtain a lot documents which they suggested the claimant already had.

70. The claimant contacted ACAS on 12 June 2018. The ACAS certificate was issued on 12 July 2018. Therefore those 30 days are suspended. The Claimant had until 11 August to issue her claim. The Claimant issued her claim on 6 August 2018.

Submissions

71. The claimant submitted that she had lost trust and confidence in the respondent. She said that the breach of contract which she was relying on was not the incident or incidents on 22 November but subsequent events. She said that it was the failure of the respondent (particularly Mr Rispin) to respond to her attempts to discuss those matters with him and support her. The claimant said that, although she had got another job when she resigned, she had only gone out to seek another job because she had lost trust and confidence in the respondent.

72. The respondent submitted that the claimant's complaint was out of time. They also submitted that the claimant was not unfairly dismissed. They said that she resigned because she had another job. They also submitted that she would have faced disciplinary action because of her conduct. It was suggested that that was the reason why she resigned.

Conclusions

73. The effective date of termination of the claimant's employment was 15 March 2018. She contacted ACAS on 12 June namely within that 3 month time period. The conciliation period ended on 12 July 2018. There were 30 days between day A and day B pursuant to section 207B ERA 1996, during which period time is suspended and added at the end of the period. The claimant had until 11 August 2018 to issue proceedings. She presented her claim on 6 August 2018. Therefore her claim is in time.

74. In relation to the claimant's complaint of constructive unfair dismissal, the Tribunal reminded itself that in a claim of this nature the burden of proof is on the claimant to prove the dismissal.

75. The Tribunal notes nor does it consider that the claimant could rely on incident/incidents on 22 November 2017 between herself and her manager as a breach of contract on the part of the respondent. Indeed the Tribunal consider that it would appear that the claimant herself was in breach of contract on both of those occasions in respect of her behaviour towards her manager. She admitted she shouted and swore at him and walked out of her job.

76. The Tribunal does not consider that the respondent's failure to respond to the claimant's request to discuss those incident / incidents is sufficient in the

circumstances of this case to amount to a breach of contract on the part of the respondent.

77. The Tribunal does not consider that the respondent handled the situation particularly well. They made no attempts to arrange an investigatory or disciplinary meeting in respect of what they alleged were concerns about the claimant's behaviour on 22 November 2017. Further the respondent did not respond in the way one would expect an employer to respond to the claimant's telephone calls or more importantly texts about the concerns raised by her about the matter. The respondent took the view that the matter should be dealt with at a meeting, which one would expect to be proper way of managing employment relations in such circumstances. The respondent indicated, albeit not particularly clearly to the claimant, that there would be a return to work meeting with her. However the claimant never returned to work and decided to leave the respondent's employment rather than go to any return to work meeting. The respondent did not know that the claimant was going to leave her employment. Indeed the claimant gave no indication that she considered the matter of such concern that she may leave, which one would have expected in those circumstances. Furthermore, the claimant herself did not appear to make any active contact with the respondent after January 2018. It is necessary to consider that, although the claimant may have had concerns, the context of what happened on 22 November and the claimant's own behaviour has to be taken into account. This Tribunal does not consider that, in those circumstances, the respondent's failure to respond to the claimant's request for a meeting which appeared to be only on her terms was enough in itself to amount to a fundamental breach of contract on the part of the respondents.
78. Although the Tribunal accepts that the claimant would probably not have started looking for alternative employment had she not got these concerns, it finds nevertheless that the reason why she subsequently resigned was to take up new employment.
79. Finally in any event the Tribunal finds that the claimant did affirm the contract in the meantime. In her own evidence she indicated that she knew that she had effectively lost all trust and confidence in the respondents by early January 2018. She started to look for alternative work, yet she did not actually resign until after she had started work, namely over two months later on 11 March. Furthermore during that period she continued to receive sick pay from the respondent.
80. Accordingly for those reasons the Tribunal does not find that the claimant was constructively unfairly dismissed. Her complaint of unfair dismissal is not well founded and is hereby dismissed.
81. By way of obiter remarks it is clear from the above that the Tribunal did not need to make any findings on the date when the claimant's employment commenced. It became clear during the course of these proceedings that the claimant was unaware that, what she considered to be a period of maternity leave in April 2011, was considered by the respondent to be a termination of her employment. They suggested that her employment with them did not commence until March 2012, after what she believed to be her maternity

leave. Her earlier period of employment did not count towards her continuous employment. The Tribunal did not make any findings of fact in relation to that matter, but the claimant may want to consider the matter further.

Employment Judge Martin

Date 1 March 2019