



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103806/2020 (V)

Held via video conference call on 15,16 and 17 December 2020

Employment Judge M Sutherland

Catherine McPhee

Claimant

Albert Bartlett & Sons (Airdrie) Limited

Respondent

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claimant was not constructively dismissed and her complaint is therefore dismissed.

REASONS

Introduction

1. The claimant made a complaint of constructive unfair dismissal.
2. The claimant was represented by Mr A Cox. The respondent was represented by Ms C McGowan, Head of HR for the Respondent.
3. The issues to be determined were as follows: Was there a repudiatory breach of the claimant's contract? If so, was the breach a factor in the claimant's resignation? If so, did the claimant affirm the breach? If not, did the Respondent have a potentially fair reason for the conduct amounting to a repudiatory breach? If so, was the conduct reasonable in the circumstances such that the constructive dismissal was fair? If not, what compensation should be paid by way of a basic and compensatory award?
4. At the hearing the Claimant clarified that the acts and omissions relied upon in asserting a repudiatory breach of the duty of trust and confidence were: the conduct of the Health Review meetings but not the fact of holding those meetings (the Claimant accepted that the Respondent had a right to

hold those meetings); and the timing of the sending of the disciplinary invite but not the fact and terms of that invite (the Claimant accepted that the Respondent had a right to hold a disciplinary hearing and send an invite to it).

5. The claimant gave evidence on her own behalf. The respondent led evidence from Mandy Maxwell, Administration Manager.
6. The parties lodged a joint set of documents.
7. The parties made closing submissions.

Findings in fact

8. The Tribunal makes the following findings in fact:
9. The Respondent is an international potato grower with a head office in Paisley. The Respondent is a large employer with around 650 employees based at its Head Office in Airdrie and has a dedicated HR function.
10. The claimant was employed by the Respondent from 1 July 2008 until 4 April 2020. She was employed as an Office Administrator at their head office. Her duties included attending to filing, invoices, expenses and reception. The Claimant reported to Mandy Maxwell, Administration Manager who was her line manager. The Claimant had a good friendly working relationship with Mandy Maxwell. Mandy Maxwell in turn reported to Sara Miller, Director.
11. The Claimant had a sinus operation on from 6 December 2019 and was then absent from work until 3 January 2020. Mandy Maxwell her line manager was in regular contact with her by text and otherwise during her absence. Under the Respondent's Absence Management Policy the Claimant's line manager Mandy Maxwell held a return to work meeting with the Claimant immediately upon her return on 3 January 2020. At that meeting the Claimant advised that she had not suffered any symptoms since 24 December 2019 and she had been certified as fit to return to work by her GP.
12. Immediately after the return to work meeting had ended the Claimant asked to take 6 weeks leave (part unpaid; part paid) starting mid-February

2020 to visit her daughter in Abu Dhabi to allow her to look after a young grandchild whose nursery place was not available until the later in the year. The Claimant had previously taken shorter paid leave around that time to visit her daughter in Abu Dhabi which had been granted. The request to take unpaid leave was discussed at a meeting on 3 January 2020 and was declined by stated reason that the Claimant had already had extended sick leave and because it was contrary to business need. In response the Claimant stated that if she was unable to go for 6 weeks she would just have to resign.

13. On 6 January 2020 the Claimant attended her GP and was provided with a statement of unfitness for work for 5 weeks citing post-operative recovery which covered the period until she saw her ENT consultant. Mandy Maxwell her line manager was in regular contact with her by text during that period of absence.
14. Under their Absence Management Policy, the Respondent reviews the absence of an employee who is on long term sick leave at monthly intervals. Health review meetings take place at work or at the employee's home. The purpose of the health review meeting is to discuss the reason for the employee's absence and when they will be able to return to work. A health review meeting was arranged for 15 January 2020 (less than 2 weeks after her return to work for 1 day on 3 January). Her line manager believed that her absence may be related to the refusal to grant her unpaid leave. She believed this because of the timing of that leave after she had presented as fit to work but was then declined unpaid leave.
15. On Friday 10 January 2020 the Claimant called Mandy Maxwell (her line manager) to discuss the format and purpose of Health Review Meeting. She had wanted the meeting to be in a café rather than at work. Mandy Maxwell explained that this would not be appropriate because it was not private. Mandy Maxwell explained that she and HR would be in attendance. The Claimant did not raise any issue with this. The Claimant did not ask whether she could be accompanied at the Health Review meetings.
16. A health review meeting took place at the Claimant's home on 15 January 2020. The meeting was attended by the Claimant, Mandy Maxwell (her line

manager) and Charlene McGowan (Head of HR). The Claimant was not accompanied by a family member, friend or colleague. The Claimant was not advised that she could have someone present because the formal right to be accompanied only arises in respect of the formal procedure for unacceptable levels of absence. The Claimant did not advise of any difficulty having been caused by not being accompanied and she did not ask to be accompanied at the second health review meeting.

17. At the meeting the Claimant was asked about the cause of her absence and she advised that it related to her recent operation. She was asked if she was able to work shorter days. She advised she was not. She advised she had not been out of the house as her nose runs constantly and she was not comfortable being out in public. She advised that her GP was unable to assist and she was therefore waiting to see the ENT consultant. She advised she was not taking any prescribed medication. (She was not prescribed any medication for her sinuses in period between her return to work on 3 January and her resignation.)
18. On 28 January 2020 the Claimant advised the Respondent she was now getting out and about (having gone to the gym). Her sick line was due to expire on 12 February 2020. In light of this the Respondent arranged a further Health Review meeting on 5 February 2020. On 28 January 2020 the Claimant advised by text that she was getting worked up and anxious at the thought of more meetings. She was asked by text when her ENT consultation would take place and she advised that the date had been changed by them to April 2020.
19. The Claimant was in receipt of full company sick pay in respect of her absences until 1 February 2020.
20. A health review meeting took place at the Claimant's home on 5 February 2020. The meeting was attended by the Claimant, Mandy Maxwell (her line manager) and Charlene McGowan (HR). The Claimant was not accompanied. The Claimant was visibly upset and nervous at the meeting. She advised that she was suffering from anxiety and her doctor had prescribed anxiety medication (around 29 January 2020). At that meeting she advised that she would be going to Abu Dhabi to visit her daughter and to help look after the baby. She advised that she would be going on

the weeks she had originally requested. She was asked how she was going to present the absence given that she had been refused unpaid leave and her sick line expired on 12 February. She advised that she would remain off sick and would be going back to her GP. She advised she was going to Abu Dhabi regardless. She was asked about the ENT consultant's appointment in February and she advised that this had been changed by the consultant to 6 April 2020. She was asked a number of questions at the meeting by both attendees but was not bombarded with questions in the sense of being under attack. The questions were appropriate questions and she was given time to answer them. She felt under scrutiny because she was being asked to explain how she was going to present the absence when her sick note was about to expire and when she had already been refused unpaid leave to go. The Claimant was anxious during the meeting and had just wanted the meeting to end.

21. The Respondent was concerned that the Claimant was fit to return to work but chose to remain absent so that she could go to Abu Dhabi for 6 weeks. The stated basis for their belief was that she was fit to return on 3 January 2020; when her request for 6 weeks leave was declined she threatened to resign and then immediately went off sick for a further 5 weeks; on 5 February 2020 she advised of her intention to take the 6 weeks leave before she had been seen by her GP and before the period of absence had been certified by her GP.
22. On 12 February 2020 the Claimant attended her GP and was provided with a statement of unfitness for work for 8 weeks citing post-operative recovery which covered the period until she saw her ENT consultant (the date of ENT consultant's appointment having been changed).
23. On 2 March 2020 a letter was sent to the Claimant's home address inviting her to a disciplinary hearing on 2 April 2020. In summary the allegations were that she had gone to Abu Dhabi for 6 weeks when her request for that leave had been declined and falsely asserting that the reason for her absence was her health. She was warned that the allegations if proven could amount to gross misconduct and may result in her dismissal. She was advised that she would be given an opportunity to respond to the

allegations at the disciplinary hearing. (No prior investigatory interview was held with the Claimant.) She was advised of her right to be accompanied.

24. The Respondent was aware that the Claimant was in Abu Dhabi when the letter was sent. The disciplinary invite was sent to her home address on the understanding that it would either be forwarded to her or that she would see it upon her return. On 3 March 2020 the Claimant emailed Charlene McGowan, HR asking about her holiday entitlement and as part of her reply Charlene McGowan advised that a letter had been sent to her home address regarding her absence.
25. A couple of days after the disciplinary invite letter was sent, the Claimant's son telephoned to advise the Claimant of the disciplinary invite and sent screen shots which she was unable to read fully. The Claimant did not contact the Respondent to ask for a copy of the disciplinary invite to be sent to her by email.
26. The Claimant resigned because she received the invite to the disciplinary hearing. She felt she had no option to resign because she felt she couldn't handle the stress of the meeting and that they would just dismiss her. She resigned on 7 March 2020 with notice which ended on 4 April 2020.
27. At the time of her resignation the Claimant was in receipt of pay of £1,183.50 gross (£1,020 net) a month and an employer pension contribution of 3%. Since her resignation she has made weekly applications for work in retail but has not made any applications for work in administration. The Claimant has been unable to secure alternative employment since her resignation and has instead been in receipt of universal credit.

Observations on the evidence

28. The standard of proof is on balance of probabilities, which means that if the tribunal considers that, on the evidence, the occurrence of an event was more likely than not, then the tribunal is satisfied that the event in fact occurred.
29. The Respondent witness Mandy Maxwell answered the questions put fully and without hesitation. She did not seek to answer questions in a self-

serving manner. Her answers were consistent with the documentary evidence. She came across as both credible and reliable.

30. Whilst the Claimant came across as mostly credible and reliable in her testimony her answer on a significant issue was not consistent with the other evidence. The Claimant stated in evidence that around 10 January 2020 she had asked Mandy Maxwell by telephone if she could be accompanied at the health review meetings and this request was declined by Mandy. Mandy Maxwell stated in evidence that they did have a telephone call around that time about where the meeting was to be held but she did not recall her asking about being accompanied and if she had been she would have said yes. She explained that relatives would sometimes sit in when health review meetings were conducted at home but the formal right to be accompanied only arises in respect of the formal procedure for unacceptable levels of absence. The other communication between the Claimant and Mandy Maxwell around that time had been by text and whilst there was reference to the place of the meeting in the texts there was no reference to this request to be accompanied. The Claimant did not raise the issue of her request having been refused at any time either by text exchange with Mandy Maxwell or at the Health Review meetings where the Head of HR was present. In the circumstances it is considered more likely than not that the Claimant did not ask whether she could be accompanied at the Health Review meetings.

Submissions

31. The Claimant's submissions were in summary as follows –
- a. The health review meetings were arranged at greater frequency than the policy provides; two members of staff attended; and the Claimant was not advised she could be accompanied. This added to the Claimant's anxiety. By the time of the second health review meeting the Respondents were fully aware of the Claimant's anxiety. This anxiety increased because the Claimant was aware that she was to announce that she was going to Abu Dhabi; during the meeting she was warned of the risk of disciplinary procedures; and she was bombarded with questions by both attendees in turn.

- b. Receipt of the disciplinary invite was a stressful and anxiety creating event that was significantly exacerbated by being sent when she was out of the country and signed off sick.
- c. the Respondents, through the two home visits, and culminating in the disciplinary invite, engaged in a course of conduct which amounted (by their nature) cumulatively to a fundamental breach of the implied duty of mutual trust and confidence, leading the employee to resign in response.
- d. There was not a fair reason for her dismissal. She would not have been fairly dismissed had she not resigned. She did not contribute to her dismissal. She took adequate steps to mitigate her losses.

32. The respondent's submissions were in summary as follows –

- a. The Respondent was entitled to arrange the home visits and had good reason to do so. She had presented fit on 3 January but went off sick when extended leave was declined. The second meeting was held one week prior to her return date (when her medical certificate would expire). The attendees acted reasonably during those visits.
- b. The Respondent was entitled to invite the Claimant to a disciplinary hearing where it suspected her of misconduct. The letter was provided 4 weeks prior to that hearing to allow her to return to the UK. The receipt of an invite to a disciplinary hearing would have caused anxiety whether or not she was abroad staying with family or at home. The Claimant was not signed off with anxiety but because of her nose.
- c. If she was constructively dismissed her misconduct amounted to a fair reason for her dismissal. She would have been fairly dismissed had she not resigned. She substantially contributed to her dismissal.

Discussion and decision

33. 'Dismissal' is defined in s 95(1) ERA 1996 to include 'constructive dismissal', which occurs where an employee terminates the contract under which they are employed (with or without notice) in circumstances in which they are entitled to terminate it without notice by reason of the employer's conduct (s 95(1)(c)).
34. The test of whether an employee is entitled to terminate their contract of employment without notice is a contractual one: has the employer acted in a way amounting to a repudiatory breach of the contract or shown an intention not to be bound by an essential term of the contract: (*Western Excavating (ECC) Ltd v Sharp [1978] ICR 221*).
35. The issues in this case are as follows: Was there a repudiatory breach of the claimant's contract? If so, was the breach a factor in the claimant's resignation? If so, did the claimant affirm the breach? If not, did the Respondent have a potentially fair reason for the conduct amounting to a repudiatory breach? If so, was the conduct reasonable in the circumstances such that the constructive dismissal was fair? If not, what compensation should be paid by way of a basic and compensatory award?

Was there a repudiatory breach of contract?

36. There must be a breach of contract by the employer. The breach must be "a significant breach going to the root of the contract" (*Western Excavating*). This may be a breach of an express or implied term. The essential terms of a contract would ordinarily include express terms regarding pay, duties and hours and the implied term that the employer will not, without reasonable and proper cause, act in such a way as is calculated or likely to destroy or seriously damage the mutual trust and confidence between the parties (*Malik v Bank of Credit and Commerce International Ltd [1998] AC 20*).
37. The breach may consist of a one-off act amounting to a repudiatory breach. Alternatively, there may be a continuing course of conduct extending over a period and culminating in a "last straw" which considered together amount to a repudiatory breach. The "last straw" need not of itself amount to a breach of contract but it must contribute something to the repudiatory breach. Whilst the last straw must not be entirely innocuous or

utterly trivial it does not require of itself to be unreasonable or blameworthy (*London Borough of Waltham Forest v Omilaju [2005] IRLR 35*).

38. Whether there is a breach is determined objectively: would a reasonable person in the circumstances have considered that there had been a breach. As regards the implied term of trust and confidence: *"The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of..."* (*Leeds Dental Team Ltd v Rose [2014] IRLR 8, EAT*).
39. The claimant asserted that there was a breach of the implied duty of trust and confidence because of: the conduct of the Health Review meetings but not the fact of holding those meetings (the Claimant accepted that the Respondent had a right to hold those meetings); and the timing of the sending of the disciplinary invite but not the fact and terms of that invite (the Claimant accepted that the Respondent had a right to hold a disciplinary hearing and send an invite to it).

Health Review Meeting on 15 January 2020

40. As regards the first health review meeting the Claimant asserted that: the meeting was premature (being 9 days into a 35 day sick line); she was refused to have someone present; there were two members of staff present; and she was not offered to have someone present.
41. Health review meetings normally take place at monthly intervals. The Claimant had presented as fit to work on 3 January 2020 but when she was refused unpaid leave she threatened to resign and immediately went off sick. Her line manager believed that her absence may be related to the refusal to grant her unpaid leave. It was entirely reasonable for her line manager to arrange a Health Review Meeting in the circumstances to discuss the reason for her absence and her return to work.
42. The Claimant did not ask about being accompanied to the health review meeting and was not refused to have someone present at the meeting. The Claimant was not advised that she could have someone present

because the formal right to be accompanied only arises in respect of the formal procedure for unacceptable levels of absence. The Claimant did not advise of any difficulty having been caused by not being accompanied. She did not ask to be accompanied at the second health review meeting.

43. The Claimant had been advised in advance that there would be two members of staff present at the meeting: her line manager and someone from HR. The Claimant did not raise any issue with this either before or after the meeting.

Health Review Meeting on 5 February 2020

44. As regards the second health meeting the Claimant asserted that: the meeting was premature (being 21 days after the first meeting); there were two members of staff present; she was not offered to have someone present; she was bombarded with questions.
45. Health review meetings normally take place at monthly intervals. On 28 January 2020 the Claimant advised the Respondent she was now getting out and about. Her sick line was due to expire on 12 February 2020. In light of this the Respondent arranged a further Health Review meeting on 5 February 2020. It was entirely reasonable for her line manager to arrange a Health Review Meeting in the circumstances to discuss her return to work.
46. The Claimant was aware from the previous meeting that there would be two members of staff present: her line manager and someone from HR. The Claimant did not raise any issue with this.
47. The Claimant was not advised that she could have someone present because the formal right to be accompanied only arises in respect of the formal procedure for unacceptable levels of absence. The Claimant did not advise of any difficulty having been caused by not being accompanied.
48. The Claimant was not bombarded with questions in the sense of being under attack. The Claimant advised that she was going to Abu Dhabi regardless. She felt under scrutiny because she was being asked to explain how she was going to present the absence when her sick note was

about to expire and when she had already been refused unpaid leave to go.

Disciplinary invite issued on 2 March 2020

49. As regards the timing of the disciplinary invite the Claimant asserted that: receipt of the disciplinary invite was a stressful and anxiety creating event that was significantly exacerbated by being sent when she was out of the country and signed off sick.
50. The alleged misconduct occurred on or about 12 February 2020; on 12 February 2020 the Claimant was signed off work for 8 weeks because of her nose (post-operative recovery) and not because of anxiety; in mid-February the Claimant went to Abu Dhabi for 6 weeks; the disciplinary invite was issued on 2 March 2020 inviting her to a disciplinary hearing on 2 April 2020, after her proposed return. In the circumstances it was entirely reasonable for the disciplinary invite to be issued whilst she was out of the country and signed off sick.
51. Objectively considered from the perspective of a reasonable person in the position of the Claimant these events when considered together did not constitute a course of conduct calculated or likely to destroy or damage the relationship of trust and confidence without reasonable and proper cause. There was no repudiatory breach and accordingly the claimant did not terminate her contract in circumstances in which she was entitled to terminate it without notice by reason of the Respondent's conduct. The claimant was not therefore constructively dismissed and instead resigned voluntarily.
52. In the circumstances it is not necessary to consider whether the alleged breach was a factor (i.e. played a part) in the claimant's resignation or whether the claimant affirmed the alleged breach.

**M Sutherland
Employment Judge**

**22 January 2021
Date of Judgment**

Date sent to parties

29 January 2021