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THE EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mrs M Ali

v

Virgin Active Limited

Heard at: London Central

On: 17-18 January 2018
(and in Chambers)

Before: Employment Judge J Wade

Members: Ms T Breslin
Mr J Carroll

Representation:

Claimant: Mr McLean, Counsel
Respondent: Ms R Kennedy, Counsel

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that the Respondent did not:-

1. Constructively unfairly dismiss the Claimant or
2. Discriminate against her because of age, or harass her.

REASONS

- 1 Mrs Ali worked for the Respondent as Junior Activities Manager (or, according to what she said on the ET1, as Crèche Manager) from October 2006 until she resigned on 14 April 2017. She says that she was forced to resign because of the Respondent's behaviour towards her which amounted to a fundamental breach of the implied term of mutual trust and confidence and therefore constructive unfair dismissal in breach of the Employment Rights Act 1996 section 98.

- 2 She also says that the reason for the Respondent's behaviour was her age and that she was harassed by being subjected to various management actions for reasons related to her age, in breach of the Equality Act 2010 sections 13 and 26.

The evidence

- 3 We heard evidence from the Claimant and her son, Mr Hani Ali. We also heard very briefly from Mrs Sarah Colbourne. A reference given for the Claimant by Ms Colbourne appeared to be inaccurate and we suggested to her that she reflect upon the dangers of such inaccuracy although her evidence was not relevant to our decision. We read a short statement given by former General Manager Kati Meagher but she did not attend to give evidence because the Respondent did not have any questions for her, and neither did we.
- 4 For the Respondent we heard from Donna Collins, at the time Junior Activities Development Coordinator; Daniel Forster, General Manager at the Notting Hill Club where the Claimant worked; Krishan Patel, Operations Manager at the Club and Richard Downs, General Manager for Aldersgate and Merchant Square who considered the Claimant's grievance.

The Facts

- 5 The Claimant was first employed to run the crèche at the Notting Hill Club on 9 October 2006. Throughout her employment she was the manager and latterly the title was Junior Activities Manger ("JAM").
- 6 The Respondent's witnesses all wished to emphasise that the Claimant had many great strengths. She was well known as an excellent crèche manager who worked exceedingly effectively with the children and parents who came there. They had no safeguarding issues about her work and praised her abilities. The issues which arose had nothing whatsoever to do with this side of the Claimant's work.
- 7 As a manager the Claimant had various other responsibilities on the commercial side of the operation. She had a budget and a target and needed to sell memberships and make sure that current members were retained.
- 8 An important management audit tool is the regular "health check" which is carried out for each team. There is no suggestion that the Claimant was unfairly subjected to health checks or that she was targeted because of her

age. These checks consist of several pages of questions and they are quite a blunt instrument designed to obtain an overall picture of how the team is doing and where the areas for improvement lie. They are also binary in that the answer to most questions is either yes or no. They are not used to measure the more nuanced points of performance and do not diagnose the reasons behind the answers given. A poor health check does not lead directly to performance management.

- 9 In October 2016 a health check conducted by Emma Gibbs identified some concerns about the commercial performance of the claimant's team. The team's overall score was 76% but the commercial performance was low at 47%. Ms Gibbs advised her that this side of her work needed to be her main focus until the end of the year and she offered ongoing support.
- 10 In October 2016, a new General Manager had arrived at the Club, Mr Daniel Forster. He wanted to make up his own mind and did not rush to judgment about the Claimant, particularly as he was aware that she was very good at the child care side of her job.
- 11 At that time, there was a large national restructuring going on across the whole of Virgin Active. Also, the claimant's junior activities operation at the Notting Hill club was being radically refurbished. From being a one roomed crèche for small children, it was being remodelled to be a three-room function which catered for children up to the age of 15. The Claimant had long pressed for this development and was pleased that it was happening, but as the manager she was going to have to step up to the plate and be a much more than an excellent crèche manager. Probably because of the national restructuring, a plan for how this development was to be implemented was not drawn up which was a shame as this would have been desirable.
- 12 Shortly after he arrived Mr Forster worked with the Claimant to write her team's business plan for the new improved junior activities function and he was satisfied that she both understood and was committed to it. The plan of course involved her delivering on commercial targets as well as continuing to work well with the children in her care.
- 13 Following the October health check there was no follow up and no "letter of concern" was written to the Claimant, see paragraph 25 below.
- 14 Mr Forster was disappointed that Mrs Ali did not attend many of the project meetings relating to the refurbishment but he got the sense that she was very stressed and wanted to do what he could to assist her, so he did not press the point. She says that he did not help her much but we find that this is not accurate. For example, he described how at her request he had talked to her team members about behaviour issues.

- 15 On 8 March 2017, Donna Collins, National Junior Activities Development Coordinator carried out the next health check. She had known the Claimant for quite some time and worked alongside her because her job was to develop junior activity nationally. It was an unannounced health check which coincided with a period of holiday for the Claimant, but this was not exceptional. Health checks are never announced and it is the manager's duty to ensure that the operation runs well even if she is not physically at work.
- 16 Ms Collins was worried about the 2016 score and commented to Mr Forster at the time that she wondered whether the Claimant would be able to succeed with running the expanded facility. They both thought she seemed very stressed which was a great pity as she had pushed for this expansion for so long.
- 17 She carried out the exercise conscientiously and this time the score was down to 68%. There were a number of small issues under some of the headings, but generally speaking, as always, performance on matters such as safeguarding was good. The problem was that the commercial score was down to 44.44%.
- 18 A disproportionate amount of time was spent during the hearing talking about the scoring as the Claimant wanted to challenge many points, even though she also understood that this was a binary and broad brush exercise which was not open to further evaluation and reconsideration. However, she agreed that she had not been successful on many of the commercial objectives, and so understood why she was marked down to 44.44% even if she did not accept it.
- 19 A rather strange situation had developed. The Claimant strongly wanted the new facility and yet she was demonstrating to her managers that she was going to struggle with the commercial aspects of marketing it and giving the business a return for its investment. The managers were concerned because they thought that there was something wrong and wanted to help, but neither Ms Collins nor Mr Forster thought that the Claimant was going to fail if she accepted the support that they were prepared to offer her to get the commercial aspects of the role right. When asked what he thought would happen at the end of this process Mr Forster said he thought that the Claimant would do a fantastic job.
- 20 The Claimant says that after the health check she was left to sink, but this was not an accurate description. It is true that the employer did not formulate and implement a specific support plan for her, but this was partly because they found the Claimant unreceptive to their offers. Looking at the successful performance of other JAMs, it is clear that the Claimant was not being presented with an impossible task but she did not seem able to start trying.

- 21 There is no indication whatsoever that any concerns which Ms Collins may have had were connected to the Claimant's age. It is true that she was older than most of the employees at the Club, and most other JAMs, but she was highly respected, and only 53.
- 22 Following the health check, the Claimant, Ms Collins and Mr Forster met on 13 March to discuss what needed to be done. Mr Forster then held three one to ones with the Claimant in quick succession to check on progress and offer help. The Claimant was not happy with this and he says that when he tried to go through the various points in the health check, she cut him off by reassuring him that everything was in hand and he could not get her to engage.
- 23 At the same time the Claimant was not helping herself. She did not contact other JAMs who had successfully made the transition from a small to a larger function for advice. Also, she was spending a great deal of time working with the children and not carving out time to do management, despite the fact that the crèche was closed during the middle of the day. Mr Forster expected that with the new facility coming on stream the membership would go up, but they were struggling to hold on to members or recruit new ones.
- 24 Mr Forster also met with the Claimant informally, outside the one to one process, on 15 March. He was concerned that she seemed so stressed and not like herself and that she was struggling with the commercial side of things. She had told him that she loved working with the children and he therefore gently raised the possibility that she might be interested in the vacant supervisor role as he wondered if the manager role was too much for her. The Claimant was most offended by this suggestion and would not consider it, which was a shame because he was trying to help. He made it clear to her that he would support her as best he could whether she wanted to stay in the manager position or not. We do not doubt his sincerity, or that it was communicated to the Claimant. We regret to say that at this stage the Claimant perceived all management activity as negative and was not able to hear that support was being offered.
- 25 Bearing in mind that there had been two successive troubling health checks, Mr Forster issued a "letter of concern" on 23 March. He said in that letter "please let me know if you require any more additional support". He told her that "a failure to improve may result in disciplinary action being initiated". It was therefore clear that this letter of concern was not a disciplinary action or an ultimatum. The Claimant said this was evidence that they were planning to discipline her, but she understood that such a letter was not the first step in the disciplinary process, not least because she had sent them to a number of her team in the past, who had not subsequently been disciplined.
- 26 On 10 April 2017, Ms Collins visited to do a follow up health check. She says that she found the Claimant obstructive and dismissive. She was made to feel very uncomfortable and whilst she thought and hoped that she could support the Claimant and get her to where she needed to be, she was

disappointed by this defensive reaction to new ideas and the offer of support. Ms Collins said that she did not think about disciplining the Claimant for insubordination because her mindset was that the Claimant was going to succeed and indeed it was her job to make sure that she did. The Claimant says that Ms Collins was irrational and rude. There is no evidence of that in emails and Ms Collins's behaviour at the Tribunal suggested to us that she was a thoughtful and measured person. In contrast the Claimant did become quite angry and upset at times during the hearing. Of course, hearings are very stressful, but this behaviour was relevant.

- 27 Quite a lot of omissions still to be rectified were found on 10 April and Ms Collins was disappointed by this. Nonetheless she sent an upbeat follow up email on 11 April, praising the Claimant where she could, and offering support.
- 28 The Claimant felt judged and unsupported. She was upset at the suggestion that she might like to take the junior supervisor role. She was again upset when her colleague Mr Patel (who she regarded as a friend) told her that he had got clearance from the Regional Director that she could do the supervisor role if she wanted to, and with no reduction in salary. However, she told him in an email on 11 April that she would not take that position and had decided to leave. He immediately responded saying that he did not want her feeling that way and offering a meeting. The Claimant alleges that he told her that if she did not resign she was likely to be sacked, but that it is not consistent with either the email chain which shows him trying very hard to persuade the Claimant to think again, or his evidence at the hearing. Also, he was not a decision maker so whatever he said was not an official piece of management advice.
- 29 The Claimant's confidence was not helped by an email from the Regional Director on 12 April telling her that the ongoing failure of health checks was not acceptable. Unfortunately, this was true.
- 30 On 12 April the Claimant again told Mr Patel that she wanted to resign. She agrees that he did not want her to leave and he did of course have commercial as well as personal reasons for this in that he knew that the customers loved her. He emailed her on Wednesday 12 April, he could not find her to talk to because she had gone home, and said:

"if you still want to hand in your resignation anytime from now we will only accept it after Friday 2pm just to give you time to make sure it is the right decision."

This was not the action of somebody who was keeping their fingers crossed that she would resign.

- 31 On 14 April the Claimant wrote an email of resignation to Mr Forster. She told us that it was "better to resign than be sacked" and that she had made

the decision when she saw Mr Patel's email of 12 April. We find that at this point the claimant was not being faced by the prospect of dismissal if she did not resign and she had misunderstood the situation for some reason. There was a problem, but it was resolvable.

- 32 Mr Forster was not able to talk to the Claimant because she had left the building by the time he got the resignation email. He did not ring her because he did not want to appear to be oppressive but he sent her a letter on 24 April headed "Resignation in haste". He wanted to give her the opportunity to discuss the points that she had raised rather than resign. He said that if they did not hear from her within 7 days they would assume that the decision to leave was unchanged.
- 33 The resignation of 14 April contained some complaints and on 9 May the Claimant met with Mr Patel to discuss them. Mr Richard Downs, General Manager from another Club, considered the information and decided that the Claimant had not been unfairly treated. He identified that the health check had not been unfair and that the Claimant had not been bullied. He said that the offer of the opportunity to take up the supervisor post had been made because of concern about the strain that the Claimant was under but that support had been offered if she wished to stay in the manager role.

Conclusions

- 34 This is a very sad case. The Claimant was excellent at certain parts of her role and, as Ms Kennedy said in her closing submissions, the only problem was that she needed to improve the commercial aspects of her work. The Respondent was not unfairly raising these points, nor did they have a "hidden agenda" of wanting to push her out, indeed they had every reason to want to keep her on. This commitment to her was demonstrated by their efforts to dissuade her from resigning.
- 35 Whilst it might have helped if a support plan had been set up for the Claimant at the start of the restructuring, she over-reacted to the management actions aimed at providing that support, and she did not help herself. She was not being disciplined and was working with managers who believed she could succeed and wanted to help her do so, and yet she resigned. The contribution which the respondent's conduct made to the resignation does not come close to a fundamental breach of contract, in this case breach of the implied term of mutual trust and confidence and so there was no constructive unfair dismissal.
- 36 As far as discrimination is concerned, whilst the statistics which the respondent produced at the claimant's request show that the number of junior activities managers over 40 in the organisation is low, there are many possible explanations for this. There is no evidence personal to the claimant which could lead us to conclude that the Respondent's behaviour was related to her age. In terms of the resignation, there was no constructive

discriminatory dismissal (Equality Act section 39(7)(b)) because the Respondent's behaviour was not conduct which entitled her to resign and there was no sense at all that it was motivated by the Claimant's age. We did not come across phrases such as the Claimant being a "spent force" or that her face no longer fitted which might indicate age bias.

37 There was no age harassment because the employer could not reasonably be said to be engaged in conduct which had the purpose or effect of violating the Claimant's dignity and there is no evidence at all that it was related to her age.

38 For the above reason we dismiss the claims. We hope that the Claimant will take some comfort from the fact that we have recorded that she was a very good Crèche Manager.

39 For the postscript we record two things:

39.1 It is very telling that the Claimant described herself on the ET1 as a Crèche Manager, rather than a Junior Activities Manager. This does indicate that whilst she had many reasons why it was not her fault that she was struggling with certain aspects of the expanded role, she had not taken responsibility for and/or did not understand it.

39.2 Having read this judgment, the claimant might think that we listened only to the respondent. We have found many facts to be as stated by its witnesses, but that was because they were able to corroborate their points with descriptions, documents and back up from other witnesses. By contrast, the claimant's arguments, such as that they left her to sink in paragraph 20, are not backed up by evidence and were not consistent with what happened. Weighing up the evidence, our findings therefore often reflected the respondent's arguments.

Employment Judge Wade on 1 February 2018