RM

EMPLOYMENT TRIBUNALS

Claimant: **Mrs Imelda Raisbeck**

Respondent: **Power Leisure Bookmakers Ltd**

Heard at: **East London Hearing Centre**

On: **21-22 June 2018**

Before: **Employment Judge Ferguson (sitting alone)**

Representation

Claimant: **In person**

Respondent: **Ms S Omeri (Counsel)**

RESERVED JUDGMENT

It is the judgment of the Tribunal that the Claimant's complaint of unfair dismissal is dismissed.

REASONS

INTRODUCTION

1. By an ET1 presented on 28 December 2017 the Claimant brought a claim for unfair dismissal against the Respondent. The Respondent defended the claim.

2. The sole issue to be determined is whether the Claimant was constructively dismissed. In the event that she is found to have been constructively dismissed, the Respondent does not argue that the dismissal was fair.

3. The ET1 was not entirely clear about the alleged conduct of the Respondent said to constitute a fundamental breach of contract, but further information was provided at the Respondent's request and a list of allegations was agreed at the start of the hearing. That list is as follows:

3.1 Holding a disciplinary hearing on 11 February 2014 while C was on holiday;

3.2 In 2016, changing C's hours/requiring her to work every other Saturday;

3.3 From 2013 to 2016, changing the store in which C worked/constantly threatening C with a change of store;

3.4 Disciplining C in 2014 for emails she sent while "trying to get any admission of mistake from Paddy Power";

3.5 In 2016, extending C's working days;

3.6 From 2013 to 2014, cutting C's hours to 20;

3.7 At the end of 2014, Mr. Saj Nair Telling Mr. Dennis Hammond C was "not a Team Member" and was not to be included when staff rotas were done;

3.8 In 2014, requiring C to sit on a stool at the side of the counter as there was no room for her to serve when two new staff were employed;

3.9 In 2016, failing to pay C "Paddy Power Pay" and "Paddy Power Pay Rises" and Sundays extra hours and pay;

3.10 Between 31 May 2016 and 31 July 2016, lying to C about the need for consultation with her being because of new single scheduling at the Canvey Island store;

3.11 Mr. Connolly screaming at C down the phone in 2013;

3.12 Suspending C for 5 months in 2014 and carrying out flawed investigations into the disciplinary allegation that C had shouted at Mr. Connolly and called him a "fucking cunt" on the phone;

3.13 Between 2013 and 2017, not making an official decision to pay C management pay, stopping her from working on Sundays;

3.14 Appointing Nikita Falaize to the post of Assistant Manager in 2013 without first interviewing C who had also applied;

3.15 In 2014, Mr. Saj Nair Telling Shop Manager, Mr. Hammond to forget C "she's gone";

3.16 Elly Beattie wanting C to move onto a Paddy Power Contract in 2016;

3.17 Requiring C to complete a return to work certificate in 2016 when others were not required to do so?

4. When asked at the start of the hearing to confirm what act (or omission) on the part of the Respondent had triggered her resignation, the Claimant was unable to

identify a single act or omission. She relied on all of the following:

4.1 Failure of Mr Pearson to pay her a £1.25 supplement for opening the store;

4.2 The consultation in respect of her hours conducted by Elly Beattie from March 2016;

4.3 Mr Connolly's behaviour in 2014 that led to her being suspended for 5 months;

4.4 "Constant phone calls".

5. It was agreed that the Tribunal must answer the following questions in order to determine whether the Claimant was constructively dismissed:

5.1 What was the most recent act or omission on the part of R which C says caused, or triggered her resignation?

5.2 Has C affirmed the contract since that act?

5.3 If not, was that act or omission by itself a repudiatory breach of contract?

5.4 If not, was it nevertheless capable of amounting to a "last straw"?

5.5 If so, did any of the acts alleged by C either individually or cumulatively amount to a breach of the implied term of trust and confidence?

5.6 If so, did C resign in response to such breach(es)?

6. I heard evidence from the Claimant. On behalf of the Respondent I heard from James Pearson and Mark Smeaton.

THE LAW

7. Section 95(1)(c) of the ERA provides:

> **95 Circumstances in which an employee is dismissed**
> (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . ., only 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.

Dismissals pursuant to section 95(1)(c) are known as constructive dismissals.

8. Four conditions must be met in order for an employee to establish that he or she has been constructively dismissed:

8.1 There must be a breach of contract by the employer. This may be either an actual or anticipatory breach.

8.2 The breach must be repudiatory, i.e. a fundamental breach of the contract which entitles the employee to treat the contract as terminated.

8.3 The employee must leave in response to the breach.

8.4 The employee must not delay too long before resigning, otherwise he or she may be deemed to have affirmed the contract.

(*Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221; *WE Cox Toner (International) Ltd v Crook* [1981] ICR 823)

9. An employer owes an implied duty of trust and confidence to its employees. The terms of the duty were set out by the House of Lords in *Mahmud v Bank of Credit and Commerce International SA* [1997] ICR 606 and clarified in subsequent case-law as follows:

> "The employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

Any breach of this term is necessarily fundamental and entitles an employee to resign in response to it (*Morrow v Safeway Stores Ltd* [2002] IRLR 9).

10. Where an alleged breach of the implied obligation of trust and confidence consists of a series of acts on the part of the employer, the tribunal should consider whether the final act which led the employee to resign is capable of amounting to a "last straw". It might not always be unreasonable, still less blameworthy, but its essential qualify is that it is an act in a series whose cumulative effect was to amount to a breach of the implied term. It must not be utterly trivial and an entirely innocuous act on the part of the employer cannot be a final straw even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in the employer. (*Omilaju v Waltham Forest LBC* [2005] ICR 481).

11. *Omilaju* was affirmed in *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 978. In the latter case Underhill LJ held at paragraph 55:

> "I am concerned that the foregoing paragraphs [summarising the authorities on 'last straw'] may make the law in this area seem complicated and full of traps for the unwary. I do not believe that that is so. In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:
>
> (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered his or her resignation?

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term? (If it was, there is no need for any separate consideration of a possible previous affirmation…)

(5) Did the employee resign in response (or partly in response) to that breach?

FACTS

12. The Respondent is a bookmaker trading under the name "Paddy Power Betfair" with retail outlets in Great Britain and Northern Ireland, and in the Republic of Ireland.

13. The Claimant was employed by the Respondent as a Customer Service Adviser from 17 May 2012 until her resignation on 5 November 2017. The Claimant's continuity of service began on 12 February 2008 when she commenced employment with Pridmore Bookmakers. She worked at the Canvey Island store throughout and transferred to the Respondent under TUPE in May 2012.

14. Neither the Claimant nor the Respondent has a copy of the Claimant's contract with Pridmore Bookmakers, but it was understood when she transferred to the Respondent that she worked 32 hours per week across four days, Monday to Saturday. After the transfer the Claimant was given the option of moving onto a "Paddy Power contract" or remaining on her Pridmore contract. She chose to remain on her Pridmore contract. It is common ground that under a Paddy Power contract the Claimant could have been required to work more flexibly, spreading her hours over more days in the week. It is also common ground that the Paddy Power contract would have provided for higher rates of pay. In particular the Paddy Power contract states that Senior Cashiers are paid a supplement of £1.25 per hour when managing the shop in the absence of a manager.

15. From 2013 onwards the Respondent sought to persuade the Claimant to move onto a Paddy Power contract, but she consistently refused to do so.

16. On 16 July 2013 the Claimant's then Area Manager, Paul Connolly, emailed the Claimant as follows:

"Hi Imelda

I have spoken with Penny regarding what was discussed with regards your Senior Cashier role. Penny said that the only agreement regarding extra payment was for the supplement of £1.25 which would be paid to you when managing the shop in the absence of the Manager or the Assistant Manager. This is in line with all other Senior Cashiers."

17. The Claimant contends that this reflected an agreement she had reached with the Respondent that she would be paid the £1.25 supplement even if she remained on her Pridmore contract. The Respondent says that the email was referring to the ongoing discussions with the Claimant about moving to a Paddy Power contract and that it had been made clear to her she would only receive the supplement if she did so. Given the context of the Respondent seeking to persuade the Claimant to move onto a Paddy Power contract I consider it more likely that the Respondent's explanation is correct. It would be inconsistent with the Respondent's aim to offer the Claimant a supplement only paid to those on Paddy Power contracts while allowing her to remain on her Pridmore contact. Further and in any event, the Claimant accepts that she has never been paid the supplement. Even if a promise was made to her in 2013, it was not acted upon and did not amount to a contractual variation.

18. In July 2013 the Claimant made a number of complaints by email to Mr Connolly. The Respondent treated this as a grievance and a lengthy dispute ensued because the Claimant contended that she had not raised a grievance and objected to the Respondent treating her email as such.

19. In February 2014 the Claimant was disciplined for communicating with colleagues in an unacceptable manner. She was issued with a first written warning and did not appeal against that outcome.

20. In March 2014 the Respondent introduced "single scheduling" at the Canvey Island store. This meant that the store could be staffed with only one employee at certain times of the day. The Claimant's working pattern did not fit with this new system and as a result she was often allocated fewer than 32 hours in a week on the rota. She was always paid, however, for 32 hours. As a result of these difficulties the Respondent continued to seek to persuade the Claimant to move onto a Paddy Power contract, which would have allowed for more flexibility in scheduling. The Claimant refused and on 7 April 2014 Mr Connolly wrote to the Claimant giving her four weeks' notice that she would be transferred to the Southend branch from 5 May 2014. The Claimant strongly objected to this, mainly on the basis that transport to and from the store would be very difficult for her.

21. On 24 April 2014 Mr Connolly, raised a grievance against the Claimant alleging that she had telephoned him on 20 April 2014 and shouted at him down the phone as well as referring to him as a "fucking cunt".

22. As a result of the grievance the Claimant was suspended. The investigation and disciplinary process lasted some five months. On 19 September 2014 a final disciplinary outcome meeting took place and the Claimant was informed that no further action would be taken against her.

23. The Claimant returned to work at the Canvey Island store. Discussions about the Claimant's contract continued and it appears that a meeting took place in September 2015 between the Claimant and Saj Nair, the shop manager for the Southend branch. On 20 September 2015 Mr Nair emailed the Claimant, copying in Roy Spencer, then Area Manager, and Denis Hammond, the then shop manager for Canvey Island, as follows:

"Imelda

Thank you for your time the other day, especially as you came in on your A/L

Please see below what we discussed and this has been agreed with Roy:-

- Remain on Pridmore contract
- Entitlement to premium payments on Sunday's & Bank Holiday's to remain.
- 32hrs over 4 days
- £7.97p/h along with any PP pay rises
- CSTL – Allowance of £1.25 when managing
- Opted out of Sunday's
- If working a Sunday due to helping shop team, then this will be above your 32hr contract and at your availability.

If you are happy with the above then we can look at give you a couple of training shifts to refresh your memory on processes and procedures

I would like to propose a start date of WC 5th October.

Denis – This will mean that each week you will still be around 4hrs overspent as opposed to the 12 hrs you currently are, these hours and to be used to extend Imelda's cashier shift days so she does 10am-7pm.

Regards
Saj"

24. The Respondent's case is that this email is a record of a discussion with the Claimant about moving onto a Paddy Power contract and not a record of any agreement. The Respondent did not call Mr Nair, Mr Spencer or Mr Hammond to give evidence to the Tribunal and based on an ordinary reading of the email I prefer the Claimant's evidence that there had been a discussion shortly before this email during which the terms set out in the bullet points including the Claimant remaining on her Pridmore contract were, at least provisionally, agreed.

25. The Claimant said in her oral evidence that she had not confirmed the agreement because Mr Nair "was in front of me and I told him in person I agreed". He said he would let Mr Spencer know and she would start refresher training as soon as possible.

26. In early January 2016 the Canvey Island store returned to dual scheduling for three months following some robberies in the area.

27. On 1 February 2016 Elly Beattie, then District Manager, sent an email to human resources ("HR"), "to be put in Imelda's file", stating that she had had a meeting with the Claimant on 25 January 2016 to discuss and agree working shifts and hours. It states:

"Agreed by Imelda

- Stay on her Pridmore Contract
- Work as a Customer Service Team Leader
- 32 hours a week
- 4 days a week between Monday – Saturday
- No Sundays
- Any 8 hours per day in line with the company's business needs
- Imelda stated that she does not want to do overtime or move to another shop

The above agreement started on the 25th January"

28. Further discussions took place after this and on 4 March 2016 Ms Beattie sent notes of a discussion with the Claimant to HR by email. On the subject of the Claimant's contract the notes state:

> "I made Imelda aware that to receive the £7.97 and £1.25 she would need to move onto a PP contract and could not stay on a Pridmore contract. Imelda should [sic – presume "showed"] me the email sent to her from Saj and she said this was agreed with Roy. I asked her if she confirmed back to say she agreed and she said no, she didn't think she had to as the discussion with Saj and the email confirmed the agreement."

29. The notes also record that the store was currently dual manned in the evenings, but that it was due to revert to single scheduling on 4 April 2016. Both Ms Beattie and the Claimant agreed that the Claimant's hours on the Pridmore contract "would not fit".

30. When asked about these notes during her oral evidence the Claimant said that she had shown Ms Beattie the email dated 20 September 2015. Ms Beattie had said that Mr Spencer "had no authority to do that" and she "totally dismissed it".

31. Following further discussions, on 5 May 2016 Ms Beattie wrote to the Claimant to invite her to a consultation meeting to discuss proposed changes to her working pattern. A number of meetings took place and a proposal was put forward to change the Claimant's working pattern to three six-hour shifts and two seven-hour shifts a week over five days. The Claimant objected on the basis of her caring responsibilities for her husband. On 28 July 2016 Ms Beattie wrote to the Claimant to confirm that the Respondent had decided not to proceed with the changes and that she would remain on her current working pattern.

32. In July 2017 the Claimant raised a query about whether she was allowed to open the shop. She initially emailed Syed Hossain with the subject "open" saying, "can I just confirm that it is ok for me to open the shop, I do understand that I will not received the supplement as I am not on a PP contract." She was then directed to the District Manager and emailed James Pearson on 21 July 2017, again under the subject "open", as follows:

> "Hi James,
>
> Please see the below chain of emails regarding opening the shop. I completely understand I will not receive the supplement to manage, however, can I confirm whether or not I actually can open the shop as Syed has said it is act your discretion? I have also sent over the relevant paperwork which confirms I was trained to manage with Elly Beattie.
>
> I am offering to do the openings as this will assist the team particularly when there is annual leave or when we are short staffed due to sickness/member of staff leaving."

33. Mr Pearson replied saying that he was happy to allow the Claimant to open or close the shop given her experience and the fact that Ms Beattie allowed her to do so.

34. In her oral evidence the Claimant claimed that when she referred to "the supplement to manage" she was referring to a £3 supplement received by those on Paddy Power contracts to manage in the evenings. She was not referring to the £1.25 supplement for opening the shop. I do not accept this. The meaning the Claimant suggests is completely at odds with the language in the emails. The subject matter was opening the shop and the whole exchange was solely about opening. The only reference to closing comes from Mr Pearson's reply, which cannot alter the natural meaning of the Claimant's email. The only reasonable interpretation of the Claimant's emails is that she was saying she understood she would not receive the £1.25 supplement for opening because she was not on a Paddy Power contract.

35. On 25 October 2017 the Claimant took one day's authorised absence because her husband was seriously unwell. Her next shift was scheduled for 28 October 2017, but she failed to attend and did not inform her manager or the store of her absence. The Claimant was initially marked as "AWOL" for the day. Later that day, the Claimant contacted Mr Hammond, the shop manager, to explain that she was unwell. The then District Manager, James Pearson, updated the rota to mark the Claimant as unwell.

36. On 31 October 2017 the Claimant emailed Mr Pearson as follows:

> "I have just updated my manager on my situation at present and he did the same to me telling me of the emails sent from southend shop saj that I was awol and would be unpaid. I find it amazing that in 2 days you have made that decision which it has been months and you still have not done anything about my being paid for opening and managing the canvey shop, on one occasion I opening and managed the shop until 6pm. until corringham manager arrived to take over, I am fully aware that one occasion I have said that I wanted to help and was not worried as regards pay, but what about the other times, You have seen all the relevant paperwork to confirm that I have passed as a senior cashier and am entitled to the correct pay. Something that every senior cashier receives except me.? Perhaps you can make a quick decision or explain how you arrived at the awol and not correct pay."

37. Mr Pearson replied explaining why the Claimant had been marked as AWOL. He also said,

> "With regards to your pay query I will investigate this further and I will invite you to a meeting with myself and HR to discuss this and also to discuss the additional concerns you have raised in further detail. At this point I would remind you that you took the decision to remain on your Pridmore contract, which means the terms and conditions of a Paddy Power contract do not apply, this includes any supplementary payment agreements. We can of course discuss this again in more detail when we meet."

38. On 5 November 2017 the Claimant sent an email to the Respondent's Managing Director, Retail, David Newton, resigning with immediate effect. The email stated:

> "It is with great sadness that I write this E-Mail, A job that I enjoyed and was more than capable of doing I am leaving you have finally got your way. The bullying is too much to bear there is no end to it. I hope you are pleased with yourself s your main aim since you acquired the Pridmore Shops was too bully me out of a job, you have succeeded…"

39. The Claimant referred in the email to the past disciplinary action taken against her and alleged that "bullying and mistreatment" was continuing. She gave an example of offering to open and manage the shop and her offer being "totally ignored".

CONCLUSIONS

40. In accordance with the guidance in *Kaur* and the agreed list of issues, I will address each of the alleged "last straws" in turn. In respect of each I must decide the following:

40.1 Has C affirmed the contract since that act?

40.2 If not, was that act or omission by itself a repudiatory breach of contract?

40.3 If not, was it nevertheless capable of amounting to a "last straw"?

40.4 If so, did any of the acts alleged by C either individually or cumulatively amount to a breach of the implied term of trust and confidence?

40.5 If so, did C resign in response to such breach(es)?

Failure of Mr Pearson to pay the Claimant a £1.25 supplement for opening the store

41. Although the Claimant's entitlement to this supplement was discussed on a number of occasions after she was transferred to the Respondent, the first time she appears to have alleged that she had opened the store and should therefore have received it was on 31 October 2017. The Claimant has not specified the dates on which she opened the store, but it is not in dispute that she did so. I assume that any such occasions were after the email exchange in July 2017 when Mr Pearson

confirmed that she could open up. That would mean that the earliest the first alleged underpayment could have taken place was July 2017, but more likely August 2017. The Respondent did not argue that the Claimant had affirmed the contract before her resignation and I will proceed on the basis that she had not.

42. The central dispute is whether the Claimant was contractually entitled to the supplement. The height of the Claimant's case is the two emails which refer to the supplement, namely the email of 16 July 2013 from Mr Connolly referring to an agreement with "Penny" (Penny Edwards, HR), and the email dated 20 September 2015 from Mr Nair referring to an agreement with Mr Spencer.

43. As to the former, I have found that this did not amount to a variation of the Claimant's contract such that she was entitled to the supplement while remaining on her Pridmore contract. On every other occasion that such supplements were discussed, it was made clear that they were dependent on moving to a Paddy Power contract. The email is to be construed in that context. The Claimant did not move to a Paddy Power contract and was not therefore entitled to the supplement for Senior Cashiers when opening the store.

44. As to the latter, I have accepted that a discussion took place and that there was a provisional agreement that the Claimant would receive the supplement while remaining on her Pridmore contract. I do not accept, however, that this amounted to a variation of her contract. The Claimant did not confirm her agreement as requested in the email and the matter was not followed up with a written contract. The highest it can be put is that two managers suggested to the Claimant that she would be entitled to the supplement in future and the Claimant believed that that was the case until 4 March 2016 when the suggestion was "totally dismissed" by Elly Beattie. There was no concluded agreement and the Respondent never paid the supplement. Whatever doubt existed prior to March 2016, there was certainly none after that date.

45. The Claimant was not telling the truth about the email exchange in July 2017. There can be no doubt that her understanding at that stage she was that she was not entitled to the supplement. It is not clear what changed between then and October 2017, when she suddenly claimed that she was entitled to it. The most likely explanation is that the Claimant simply considered it unfair that she did not receive the supplement when those on Paddy Power contracts did. This was despite the fact that she had repeatedly been offered the opportunity to change contracts and the benefits of doing so had been explained.

46. Although I accept that there was some confusion over the issue between September 2015 and March 2016, the Claimant never had a contractual entitlement to the supplement and by the time she first opened the store she was in no doubt that she was not entitled to it. The failure to pay it between July and October 2017 did not therefore amount to a breach of contract. Nor was it capable of amounting to a "last straw". The Claimant may have considered it was unfair, but she also understood that she was not entitled to it and the reasons why. Further, when she raised it in October 2017 Mr Pearson offered to hold a meeting to discuss the matter and the Claimant resigned five days later before any such meeting could take place. The Respondent's actions can properly be described as entirely innocuous.

The consultation in respect of the Claimant's hours conducted by Elly Beattie from March 2016

47. This consultation took place from March 2016 to July 2016 and concluded on 28 July 2016 with Ms Beattie's confirmation that the Claimant's hours would not be altered. The Claimant must be taken to have affirmed the contract after that date. She remained employed for a further 15 months. Further and in any event, the mere proposal to alter her hours cannot constitute a breach of contract or last straw. The Respondent had honoured the Claimant's Pridmore contract for four years despite the fact that it caused operational difficulties with its rota. It was certainly entitled to consult with the Claimant about changing her working pattern to suit business needs.

48. One of the Claimant's main complaints about the consultation process was that Elly Beattie had said the reason for the proposed change was the move to single scheduling, which was a "lie" because single scheduling had been in place in March 2014. I do not accept that it was a lie or that the Respondent's conduct in this respect was anything other than innocuous. Although single scheduling had been in place in March 2014, the issue of the Claimant's working pattern being incompatible with it had still not been resolved. Further, at the time that the consultation was commenced the store was operating dual scheduling and was due to return to single scheduling in April 2016. There is nothing surprising in the Respondent wanting to resolve the issue at that stage and it was not untrue to say that single scheduling was the reason for the consultation.

Mr Connolly's behaviour in 2014 that led to her being suspended for 5 months

49. It is unnecessary to examine this allegation in any detail because the conduct relied upon took place in April 2014 and it is self-evident that the Claimant affirmed the contract thereafter. Even after the disciplinary proceedings which, unusually, resulted in a five-month period of suspension, the Claimant returned to work and remained employed for a further three years.

"Constant phone calls"

50. The Claimant did not give any details of this allegation and put forward no evidence of phone calls leading her to resign.

Summary

51. None of the four matters relied upon by the Claimant as acts or omissions that triggered her resignation amounts to a repudiatory breach of contract or is capable of amounting to a last straw. It is therefore unnecessary to go any further and determine the reason for the Claimant's resignation or to examine the earlier allegations. I have not made findings of fact or reached any conclusion about those matters. For the avoidance of doubt, nor have I considered the four alleged "last straws" cumulatively. To do so would undermine the rationale in *Omilaju* and *Kaur*.

52. The Claimant was not constructively dismissed and her claim for unfair dismissal therefore fails.

Employment Judge Ferguson

4 July 2018