



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms A Catchpole

v

Spicerhaart Ltd

Heard at: Bury St Edmunds

On: 9 – 12 July 2018

Before: Employment Judge Laidler

Appearances

For the Claimant: Ms S Ismail, Counsel

For the Respondent: Mr R Buch, Counsel

JUDGMENT

1. The claimant was constructively and unfairly dismissed.
2. The remedy to which the claimant is entitled will be determined at a hearing on the **19 October 2018**

REASONS

1. The ET1 in this matter was received on 12 September 2016 in which the claimant claimed constructive unfair dismissal. In the response the respondent denied that the claimant had in law been dismissed.
2. The following represents the agreed list of issues to be determined by the tribunal:

Agreed list of issues

1. Did R breach C's contract of employment? C asserts a fundamental breach of the implied term of trust and confidence.

2. Did the Respondent do any of the acts or failures to act set out below?
 - a. Bullying and harassment by C's line manager Annie Edwards between 21 December 2015 and 23 February 2016;
 - b. Failing to take steps against the behaviour of Annie Edwards, despite Richard Olliffe expressing concerns about Annie Edwards to C in October 2015 and 24 February 2016;
 - c. Failure by Richard Olliffe to contact C after his 'one to one' meeting with Annie Edwards in January 2016;
 - d. Failure by Richard Olliffe to hold a meeting between C, Annie Edwards and himself on 29 February, despite agreeing to the same on 24 February 2016;
 - e. Failure by Richard Olliffe promptly to act on C's complaints;
 - f. Carried out a flawed grievance process in that:
 - i. It took several months to complete;
 - ii. R's grievance outcome was not a fair outcome based on the evidence;
 - iii. Despite upholding most of the Claimant's complaints on appeal, offered the Claimant two wholly inadequate resolutions, namely mediation or a move to another branch.
3. If so, do the above acts or any of them amount to a repudiatory breach of contract? Despite upholding most of the Claimant's complaints on appeal, offered the Claimant two wholly inadequate resolutions, namely mediation or a move to another branch.
4. Did C resign promptly in response to the breach or breaches?
5. In the alternative C relies on the 'last straw' doctrine. In this respect:

- i. What was the most recent act (or omission) on the part of R which C says caused, or triggered, her resignation?
 - ii. Has C affirmed the contract since that act?
 - iii. If not, was that act (or omission) by itself a repudiatory breach of contract?
 - iv. If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the term of trust and confidence?
 - v. Did C resign in response (or partly in response) to that breach?
 6. Has the Respondent shown a valid reason for dismissal pursuant to s98(1)?
 7. Was the dismissal fair pursuant to s98(4) ERA 1996?
3. The Tribunal heard from the claimant, and
- Paul McGrath, Divisional Sales Director and
Darren Barney, Divisional Letting Director
for the respondent.
- Witness statements had been served from Annie Edwards and Richard Olliffe of January 2017, but they were not called to give evidence, and as a result very little weight has been given to their statements.
4. The tribunal had a bundle of documents of 413 pages. From the evidence heard the tribunal finds the following facts.

The Facts

5. It is not disputed that the claimant was appointed Acting Branch Manager for the period 1 July to 1 August 2013 and appointed Branch Partner designate on 1 August 2013. However, on the 1 October 2014 she moved to the position of Assistant Branch Partner.
6. There are two relevant policies in the bundle, the grievance policy and the harassment policy.

Grievance Policy

‘Once the complaint is received a meeting will be convened as soon as is reasonable possible, in order to discuss the grievance...

A response will be given, in writing, wherever possible to the employee within 7 working days from the date of the hearing, unless otherwise agreed.

Harassment Policy

Our Harassment Policy

We are committed to being a business in which equality of opportunity is a reality. Everyone is to be treated fairly and with respect, and is entitled to work in an environment free from harassment, victimisation and bullying...our aim is to eliminate harassment, victimisation and bullying...

The purpose of this document

This document sets out the standards of behaviour expected from all employees...

Disciplinary implications

...

Management may relocate employee should it be considered necessary. The objective will be to relocate the harasser(s) and not the complainant(s)

7. On 3 November 2014, Annie Edwards joined the respondent as senior branch partner. The claimant had worked with her in the past. The claimant accepted they had become friendly to the extent she had gone to dinner at Annie Edwards house and to a party there. She went to her hen night and had been a guest at her wedding. Although the claimant gave evidence that she expressed some reservations to Richard Olliffe when she became aware the respondent was to employ Annie Edwards, she accepted that she had no issues with her from her joining to December 2015.
8. In October 2015 three days after Annie Edwards went on holiday, Richard Olliffe then Divisional Sales Partner visited the branch and questioned the claimant about Annie Edwards’ attendance record, performance attitude and behaviour. He voiced concerns to the claimant about Annie Edwards’ performance and alluded to dismissing her. Whilst there he re-arranged desks, threw away files and re-organised the way the branch was being run including a structured plan for the branch, not being happy with how Annie Edwards was running it. The Tribunal did not hear from Richard Olliffe. When the claimant met with him on 24 February she recorded that meeting and a transcript was in the bundle. This shows the claimant referred to his visit to the branch the previous October. She is noted as saying:

“You said to me you weren’t happy with Annie and things were going to change.”

The claimant expressed her concerns at how things were and feeling really unhappy. Mr Olliffe did not in that transcript contradict what the claimant said, but stated to her he was uncertain as to the future of that branch.

9. When Annie Edwards returned from holiday in early November 2015 she was not happy with the changes made in her absence.
10. On 21 December 2015 when the claimant returned from her annual leave she felt Annie Edwards behaviour had changed towards her, that she snapped at her and was rude in front of other staff. She tried to contact Richard Olliffe to complain about Annie Edwards behaviour, but was able to speak to him. It appears from an email of 29 December that they must have been able to speak on 22 December.
11. On 23 December the claimant was called by Annie Edwards to a meeting with her in a coffee shop. The detail of the meeting and how the claimant felt that she had been treated on her return to work was set out in her email to Richard Olliffe of 29 December seen in the bundle at page 33. The claimant stated that she got frosty good mornings and was snapped at. She said that when Annie went to the hospital on 22nd she had texted Andrew that she would not be returning rather than the claimant. She explained that Annie Edwards had confronted her with a barrage of false accusations in the coffee shop as follows:

‘Helen Watkins left because of me she has accused me of bullying her??

Georgina left because of me and she accused me of bullying her??

Jade has a bad attitude because of me? and she doesn’t dress right because of how the way I dress?? (all of my clothes are designer items and I have never been told I don’t dress right for work)

She says she is angry with me because I did not attend the drinks gathering on the 18th of December.

12. The claimant concluded that she felt very hurt and upset by the behaviour, and hoped that they could discuss matters in January.
13. Although the claimant would not have known this at the time, Richard Olliffe forwarded this email to another member of staff, Kim Dewing Head of Marketing and PR, stating that he would like her views:

“I trust Anna 100%.

I dont want her to feel like this.

Is Annie right for us?”

14. Kim Dewing replied that day that it was a very unfortunate situation and that the claimant had spoken to her at length earlier that day. Her view was that the claimant worked hard and always had done. She stated she was loyal and despite some personal issues had come in every day without letting her situation affect her mood or performance.

‘If things don’t change I fear she will look for work elsewhere. This is concerning as it will not take her long to find alternative employment – she has a good reputation in the area and has been offered other jobs during the three years she has been with us.

She has said that she would like to talk to you further when you return next week so if you could spare some time on Monday I know she would really appreciate it’

15. Richard Olliffe replied he did not want the claimant to go and “will calm Monday”. He queried again about Annie. There is no evidence he did anything on the Monday. What is clear though is how much they both valued the claimant and had concerns about Annie Edwards.
16. In January 2016 Richard Olliffe did contact the claimant, and told her he was to meet with Annie Edwards and would bring up the claimant’s concerns of her behaviour towards her and report back. He never did so. In his witness statement on which of course he has not been cross examined, he does state that he discussed these matters at Annie Edwards’ one-to-one, but accepts “I did not clarify this to be the case with the claimant” and that no further communication took place between himself and the claimant in relation to this matter. The Tribunal accepts that this was disappointing for the claimant, but also notes her evidence that there were no further particular incidents concerning Annie Edwards until the events of which she complains in February. When taken to the covert recording of her meeting with Richard Olliffe the claimant acknowledged that at page 270 she told him everything was fine after Christmas and that it had been until what had happened the previous Saturday and Monday. The claimant told the Tribunal that Annie Edwards was continuing to be off with me and not the way she had been before. She was very different with her. She accepted in answer to a question from the Judge that she left Richard Olliffe with the impression however that everything was ok until the bereavement that she suffered. She was trying to resolve things through Richard Olliffe and get on with her job. She certainly made it clear to Richard Olliffe at that meeting that she had lately been feeling she could not work with Annie Edwards because “she is doing my head in”. The Tribunal finds that to be the case, that the claimant was still trying to deal with Annie Edwards change towards her and thought she was being supported in that task by Richard Olliffe.
17. On 20 February 2016 the claimant’s grandfather died and she advised Annie Edwards by text. The claimant acknowledged the initial text response was sympathetic.
18. On the Sunday at 21:21 hours the claimant texted Annie Edwards to say that she thought it best that she did not come in the next day as she was not feeling in the right frame of mind. The claimant acknowledged that although office protocol was that staff should ring the office first thing in the morning, the agreement with Annie Edwards had been that you let her know the night before if you knew you could not make it in the next day.
19. At 09:41 hours the next day Annie Edwards texted the claimant asking if there was any chance she could come in that afternoon. The claimant replied stating she was not well and there was no response to that text. The

claimant found that request to be particularly insensitive when she had already advised her of the bereavement.

20. The claimant was signed off sick on 22 February for one week with stress and anxiety, and bereavement. She sent the sick note to Richard Olliffe the next day. He responded stating he was in Norwich and suggesting that they meet for a chat the next morning. After an exchange of emails, they agreed to meet at the hotel he was staying at on 24 February. That meeting took place and is the one the claimant covertly recorded. The Tribunal therefore does have a record of what was discussed at that meeting, although it was not provided to the respondent until 17 May 2016 after the claimant's appeal had been heard. This Tribunal heard however that Mr Barney listened to the recording after upholding the claimant's appeal and before his second letter of the 17 June 2016.
21. The claimant is seen to have stated to Richard Olliffe how unhappy she felt and how she had been treated by the company. She reminded him he was supposed to call her after Christmas when he had spoken to Annie Edwards but he had not done so. He explained he had spoken to Annie Edwards, and he had asked her to take the claimant out and have a good chat. The claimant made it clear to him it was not a good chat because "She sat and dressed me down for an hour and that really upset me". It had left the claimant "in pieces". She mentioned the texts exchanged after her grandfather had died and said that it was for a manager to respect the employees wish not to come in and considered the request that she do so, out of order and rude.
22. Richard Olliffe explained he had discussed the branch with Kim Dewing and they were concerned about the claimant and whether the office had the right dynamics, the right profile and the right people. The claimant explained how she felt unsupported, particularly as Richard Olliffe had told her that he would call her after Annie Edwards' on-to-one and had not. He apologised stating "I don't want you to feel like that". The claimant stressed how she felt like a junior member of staff which she was not. Richard Olliffe then said he had been in this situation before and "the best thing that I can do is get you and Annie face-to-face with me and sit there and have a big fight, and then walk away cuddling because sometimes that does work". He would ask them both to be honest and they would work on the claimant being Annie's number two. He was hoping that it could be fixed. They discussed their respective strengths and weaknesses, and how he viewed the claimant as an exceptional estate agent. He suggested a discussion between the claimant and Annie Edwards for a 100 day plan for the branch. He emphasised the claimant would always have his 100% support.
23. The claimant stated she would be back at work on the Monday, and Richard Olliffe agreed that a conversation between the three of them needed to happen on the day the claimant came back to work. He specifically said "I don't think you can go back into work without me pulling you and Annie out of your working environment and talking to each other. If you're back to work on Monday then we need to meet somewhere on

Monday.” There was no doubt by the end of the meeting that they had agreed this meeting would happen on the Monday. He even stated he would call them when he was an hour away.

24. The claimant was clearly pleased with how this meeting had gone and emailed Richard Olliffe later that day to thank him for listening, and that she appreciated his time and support and ended it “See you Monday”. There was no reply to that email.
25. On Sunday 28 February the claimant emailed Richard Olliffe at 23:14 hours to say she had still not heard from him about the meeting. She expressed her disappointment and that she would await a time and place to meet “before my return to the office” and in the meantime contact HR for advice.
26. Richard Olliffe replied at 06:25 hours on the Monday that not everyone could do a meeting on that day and that Emma would arrange a date “today”. In his witness statement he acknowledged that it might have been more prudent to advise the claimant that he could not do the Monday rather than wait for her to contact him, but disputes that he had made a solid commitment to holding the meeting on that specific day. That is not borne out by the transcript, that shows quite clearly, he had.
27. Later that day Richard Olliffe emailed the claimant at 21:50 hours to confirm a meeting with the claimant and her line manager was the best way forward and that “I also said I would try and arrange something for Monday”. He said he didn’t realise that the claimant would not returned to work if he did not arrange the meeting. This seems rather disingenuous when both he and the claimant made it clear on 24 February meeting that such a three-way meeting was necessary on the day the claimant came back to work.
28. The claimant contacted Sarah Shah of HR about being bullied by Annie Edwards. She informed her that she had raised this with Richard Olliffe but he had not dealt with the issue. She was advised that if she wished the matter to be dealt with formally she needed to submit a written grievance which she did on 1 March 2016. She set out the background of her discussions with Richard Olliffe and the promise of a meeting, and that she had waited all week for that to be confirmed. She stated that she felt anxious in a vulnerable situation having to return to work with no meeting taking place. She had been signed off work for a further week. She wanted to be able to return to work, but needed an assurance that when she returned she would not be put in an awkward position where she was harassed and bullied by the line manager. She felt she was not supported by Annie Edwards and would wait to hear about a meeting.
29. The claimant was advised by letter of 9 March 2016 that her grievance hearing would be before Paul McGrath, on 14 March 2016. The Tribunal saw notes of the meeting at page 72 in the bundle. Paul McGrath is a divisional sales director for the Anglia division of Just Mortgages. He was at the time the same level as Richard Olliffe though not in the same team. He had not heard a grievance before and relied heavily on HR support. He

was given a script for the meeting with the claimant and for others he interviewed. For the meeting with the claimant he had a minute taker, and minutes were typed up. These show that he talked through the details of the claimant's grievance with her. He then spoke to Richard Olliffe, Annie Edwards, Jade Norcutt and Andrew Hack who were other employees in the branch. For each of the meetings the prepared script was used and the answers added in. This does not give much of a feel for the discussions he actually had. Some questions do not have an answer and Mr McGrath was unable to assist the Tribunal as to whether that meant that he had asked the question but had not got an answer or he had not asked the question at all.

30. By letter of 31 March 2016 Mr McGrath did not uphold the claimant's grievances. In his letter he quotes parts from his meeting with the claimant and gave the various responses to them. The Tribunal could not be satisfied from his evidence that he appreciated the concept of weighing evidence of the various people up and looking for inconsistencies in the evidence. Neither did he appear to look for evidence that might support the claimant as well as that which did not. He even stated in evidence in relation to one matter that he preferred what Richard Olliffe had said as he was the more 'senior'. He acknowledged the harassment policy would have been appropriate to look at, but did not do so. He recommended mediation between the claimant and Annie Edwards to "improve your working relationship" finding that the personal between them had clouded the professional relationship, and that issues in the claimant's private life may also have had an impact. No further detail about that mediation was provided.
31. The claimant appealed by letter of 4 April 2016 and gave further details stating that she felt the points in her grievance had been disregarded. She was invited to an appeal hearing before Darren Barney on 13 April 2016. Her appeal was upheld in part, although it is true to say that predominantly most of the grievance was then upheld. Mr Barney recommended a meeting between the claimant and Annie Edwards, to facilitate her return to work. Mr Barney explained that his role was to review what Mr McGrath had done and that if for example he had evidence that Richard Olliffe had given a different account to him to that which for example Mr Davies did when he spoke to the claimant, it was not for him to consider whether Mr Olliffe was misleading the grievance. Mr Barney however accepted that Mr McGrath should have asked more questions and did not do a thorough job.
32. He accepted that some of what Mr Olliffe had said was highly questionable. He could not find any absences by the claimant that required investigating, there was no record of any poor performance by the claimant, but he would not accept that was a bogus issue for Annie Edwards to have raised. There was nothing in exit interviews of the named staff to suggest they left because of the claimant. He did not question why Annie Edwards had brought to the attention of the grievance emails the claimant had sent dealing with private matters. The offer was of a meeting to be arranged between the claimant and Annie Edwards prior to the claimant recommencing employment, and that he would be happy to consider other suggestions by the claimant.

33. By email of 16 May 2016 the claimant advised Sarah Shah she did not want to return if Annie Edwards remained at the Norwich Office. She advised that she had recorded the meeting with Richard Olliffe and by 17 March email sent a link to that and the other recording with Tim Davies, the respondent's internal auditor.

34. The transcript of a telephone call with Tim Davies was from when he called the claimant. From the discussion it appears to be approximately two weeks after the death of the claimant's grandfather. The claimant referred to being asked by Annie Edwards to come in after she had said she was not able to do so and that:

'I cant work like it anymore. I'm really unhappy with her negativity and her unorganised, disorganised – she doesn't know how to use a computer system. I'm still doing everything and she keeps being horrible to me. just a complete and utter, nasty person.

Tim – Well, I've got to be honest and say I'm absolutely amazed she's even still with us.

Claimant – Well, that what I said...

Tim – Has Richard just not got the balls to do it?

...

Claimant – 'I've got all the copies of the emails I sent Richard in December, which he hasn't done anything about. I wrote an email to HR saying how I feel. I just want to be listened to, I want to be taken seriously and I want it to get sorted out and I'm not going back to work to be bullied and victimised for something I haven't done...

35. Mr Barney reviewed his findings having listened to the transcripts, and a further letter was sent on 17 June 2016. He made two recommendations – external mediation and an alternative opportunity in the business for the claimant but did not say what.

36. By letter of 20 June 2016 the claimant declined his offer and resigned. She stated that the way in which the grievance procedure had been dealt with was unacceptable and she no longer had trust and confidence in the respondent. It was all too little, too late and the stress she was under would be exacerbated if she returned.

37. By letter of 24 June 2016 the respondent expressed the desire to find a suitable alternative role for the claimant and offered her one in Haart in Norwich. By letter of 27 June 2016 the claimant declined that offer stating the role in no way compared with the work she had performed at Chewton Rose being in what she described as a lesser market and that no action had been taken against Annie Edwards.

38. By letter of 8 July 2016 the respondent accepted her resignation and the claimant's last day of employment was 19 July 2016.

The relevant law

39. The representatives were not in dispute as to the applicable legal principles. The test is still that set out in Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27:

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; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.

40. It is now well established that the fundamental breach may be of the implied term of mutual trust and confidence, as expressed in Mahmud v Bank of Credit and Commerce International SA [1997] [IRLR 462 HL] where it was stated that the employer must not;

“Without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.”

Conclusions

41. It goes without saying that there must be a fundamental breach of the contract and the claimant relies on a breach of the implied term of trust and confidence.
42. The matters the claimant relied upon are set out in the list of issues.
43. The Tribunal would not necessarily categorise the issues between Annie Edwards and the claimant as bullying and harassment in the strict legal sense but is satisfied that Annie Edwards started to behave differently towards the claimant and that the relationship had broken down making it difficult for the claimant to work with her.
44. It is way the respondent dealt with the issues raised by the claimant which this Tribunal finds overall to have breached the implied term of trust and confidence in response to which the claimant was entitled to resign and claim constructive dismissal.
45. Richard Olliffe led the claimant to believe he had serious concerns about Annie Edwards performance and that she might not remain in the business. He confirmed that he would speak to her about the matters the claimant had

raised and revert back to the claimant, but never did. He agreed to facilitate a meeting between them on 29 February 2016 and was disingenuous when he sought to suggest that a specific date was never set, when his own email confirms it had been.

46. The grievance investigation was fundamentally flawed and it is that coming as it did after Richard Olliffe's lack of action that would reasonably have led the claimant to feel and did that her grievance was not being listened to or treated seriously. The claimant utilised the grievance procedure and appealed, and although her appeal was predominantly upheld the suggested resolution was again a meeting. It is easy to see why that came as the last straw to the claimant. She had already been promised a meeting that did not materialise. It was not clear how this would assist or what form it would take. Annie Edwards had been found to have relied on matters for example poor performance and others leaving the respondent because of the claimant which were not in fact the case. External mediation was not suggested until 17 June 2016 letter, after Mr Barney listened to the recordings. Only then was the offer made of another role. A precise role however was not offered at that point. Had anyone looked at the harassment policy, even if Annie Edwards behaviour was not found to technically be harassment it would have guided them to the fact that it should not be the victim who is asked to move.
47. The Tribunal accepts the claimant's evidence that what was eventually offered was not an appropriate role for her. It would not be dealing with the type of properties she had always worked with. As the claimant stated it also came too late, the breach of contract had already occurred and could not be remedied by that offer.
48. The respondent has based its defence to these proceedings on their being no dismissal in law. It has not advanced a reason for the dismissal and it follows that the dismissal was unfair.

CASE MANAGEMENT ORDERS IN RELATION TO REMEDY

1. In agreement with the parties and taking into account dates to avoid a 1 day remedy hearing has been listed for **Friday 19 October 2018 at Bury St Edmunds Employment Tribunal.**
2. **By the 26 July 2018** the claimant to serve an amended schedule of loss, witness statement and copies of documents in support of it
3. The Respondent is to serve a counter schedule by the **9 August 2018**, if so advised

4. The parties are to agree a bundle of documents required for the remedy hearing and the claimant will have the responsibility of compiling that bundle and bringing two copies for use at the hearing

Employment Judge Laidler

Date: ...1 August 2018.....

Sent to the parties on:

.....
For the Tribunal Office