EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4103748/2018

Hearing held in Glasgow on 20th, 21st and 22nd August 2018

Employment Judge M Whitcombe

Mrs K Kerr	**Claimant** **Represented by:** **Miss S Mechan** **(Solicitor)**
Renfrewshire Council	**Respondent** **Represented by:** **Mr A McLaughlin** **(Solicitor)**

JUDGMENT

The judgment of the Tribunal is that the claim for unfair dismissal is not well-founded. The claim is therefore dismissed.

REASONS

Introduction

1. This is a claim for constructive unfair dismissal.

2. I will set out the issues with more precision below but, reduced to its bare essentials, the claim arises from a discussion or meeting on 29th August 2017 at which the claimant alleges that the respondent either made or notified her

of an intention to make unilateral and detrimental changes to her contractual working pattern. The respondent disputes that any such changes were made or notified at that meeting and contends that the discussion merely sought to establish whether or not the claimant would be prepared to agree to contractual variations of that sort.

3. The claimant alleges that the message communicated to her at that meeting and the way in which the meeting had been "orchestrated" amounted to one or more repudiatory breaches of express and implied terms of her contract of employment, which she accepted by her resignation. On that basis she alleges that she was constructively dismissed.

Summary of factual background

4. I will set out my full findings of fact below, but what follows is a summary of the essential background. It helps to put the issues arising into context.

5. The claimant was employed by the respondent from 26th March 2012. In the early part of her employment the claimant worked as an Arrears and Estates Support Officer in Development and Housing Services. In September 2015 a restructure took place which amalgamated the three roles of Arrears and Estates Support Officer, Customer Support Officer and Housing Options Officer into the single role of Housing Assistant, so from that point the claimant's role was that of Housing Assistant.

6. In October 2015 the claimant's place of work changed from Paisley (where she lives) to Johnstone. A modest travel allowance was to be paid for a maximum of four years. Sandra Fraser became the claimant's line manager.

7. The claimant's contractual working pattern was to work a total of 17.5 hours over two days (Mondays and Tuesdays). That was known as a "compressed hours" arrangement because the normal full-time working week was 35 hours spread over 5 days. The claimant was therefore working the equivalent of two and a half working days compressed into two working days. That working

pattern was both a contractual term and a permanent arrangement. For the avoidance of doubt, it was not an arrangement resulting from the application of the respondent's flexible working policy, nor was it any other form of temporary arrangement. It was common ground at this hearing that the claimant's working pattern was a contractual term which could only be varied with the claimant's consent.

8. The claimant's working pattern was also described as a "job-share arrangement" but it is necessary to describe in more detail what that meant in practice. The typical "job-share" arrangement involved one employee working from Monday morning until Wednesday lunchtime and another employee sharing that job by working from Wednesday lunchtime until the end of Friday. That arrangement would therefore provide full cover over the whole of the 35 hour working week.

9. The claimant's situation was slightly different as a result of her compressed hours. The claimant's job-share partner worked from Wednesday lunchtime until the end of Friday each week. It followed that although between them they worked for the whole time equivalent of 35 hours each week neither of them was present on Wednesday mornings.

10. I have already referred to the contentious meeting on 29th August 2017 and will consider it in more detail below. The next day, on 30th August 2017, the claimant obtained a fit note indicating that she was unfit to work by reason of work related stress, although her part-time working pattern meant that her first day of recorded absence was 4th September 2017. The claimant remained on sick leave until the termination of her employment.

11. The claimant applied for another job on 12th September 2017 and had by then made up her mind to leave the respondent's employment although her resignation came two months later. On 25th October 2017 the claimant was offered that job, subject to certain checks. She accepted the offer, subject to those checks, almost straightaway.

12. On 10th November 2017 a grievance was submitted on the claimant's behalf. On 15th November 2017 the claimant advised the respondent that she would be starting a new job on 4th December 2017. The claimant gave formal notice of her resignation on 16th November 2017 with an effective date of termination of 4th December 2017.

Issues

13. There had not been any preliminary hearing for case management and so it was necessary to discuss, agree and record the issues before any evidence was heard. No agreed list of issues had been prepared prior to the hearing and in fairness to the representatives none had been ordered. I prepared a draft list of issues which I shared with the representatives for comment and discussion. My main concern was that the precise nature of the alleged breach of contract was not clear from the claim form.

14. After some discussion I allowed Miss Mechan 30 minutes to record in writing the nature of the alleged breach of the implied term of trust and confidence. She helpfully confirmed the matters relied upon as a breach of an express term and the implied term of trust and confidence. Those details were also recorded in a subsequent email to the tribunal, copied to the respondent. The representatives were also able to narrow the issues relating to remedy.

15. What follows is an agreed list of issues for the hearing. It also served as a guide to the relevance of evidence and lines of questioning. At various points during the hearing I referred back to this list of issues in order to maintain a focus upon them.

    a. Was there a dismissal for the purposes of section 95(1)(c) of the Employment Rights Act ("ERA") 1996? For that purpose, did the respondent commit a breach of contract? The claimant alleges a breach of the following terms (as clarified by an email sent during the evening of 20th of August 2018).

i. Breach of an express contractual term in the following way: at the meeting held between the claimant, Maureen Beacom and Sandra Fraser on 29th August 2017 breaching the claimant's express terms regarding contractual working hours and the pattern (i.e. days of work).

ii. Breach of the implied term of trust and confidence, as defined in ***BCCI v Malik*** [1997] ICR 606, HL in the following way: orchestrating the meeting of 29th August 2017, knowing already that the claimant did not want to change her working pattern/contractual hours.

b. Was any breach of contract "fundamental", i.e. so serious that the claimant was entitled to resign in response? It was agreed that any breach of the implied term of trust and confidence was necessarily fundamental (see ***Morrow v Safeway Stores plc*** [2002] IRLR 9, EAT).

c. The respondent did not allege that the claimant had resigned for any reason other than those alleged by her to have been fundamental breaches of contract.

d. The respondent did not allege that the claimant had affirmed the contract in the event that there was a breach of contract.

e. The respondent did not put forward any potentially fair reason for dismissal in the event that the claimant established a constructive dismissal. It followed that no issue arose regarding the fairness of the dismissal in accordance with the test in section 98(4) ERA 1996. It was therefore accepted that the claim for unfair dismissal would succeed if the claimant established a constructive dismissal.

f. In the event that the claim succeeded, the claimant no longer sought the remedies of reinstatement or re-engagement. There were various other points of agreement regarding the calculation of compensation

which I will not set out here.

16. It should be noted that the claimant's internal grievance was put far more broadly than the constructive dismissal claim is now put. Several matters which formed part of the subject matter of that grievance are not now alleged to have formed part of a breach of contract or to have been part of the reason for the claimant's resignation. It is not necessary for me to list them here.

Evidence and case management

Documents

17. The representatives had prepared an agreed joint bundle of documents running to 206 pages. No documents were added to it during the hearing.

18. At my request the schedule of loss was updated in time for closing submissions although one or two errors required further correction.

19. There was no order for written submissions but both representatives intended to rely on them anyway. They were exchanged between the representatives and pre-read by me before oral submissions began.

Witnesses

20. The claimant was her only witness.

21. The respondent called evidence from:

    a. Sandra Fraser (Senior Housing Officer with Housing Services and supervisor of Housing Assistants including the claimant);

    b. Maureen Beacom (Local Housing Manager for Johnstone and the villages, the overall manager of the section);

c. Edward Simpson (Senior HR advisor).

22. All witnesses gave evidence on oath or affirmation and were cross-examined. Sometimes I also asked some of my own questions. When I did so I gave both representatives a chance to ask any questions arising. There was no order for witness statements in this case and none were used.

23. I did not impose a rigid timetable but I did ask the representatives for time estimates for the examination of witnesses both at the start of the hearing and also during the hearing as the case developed. I did not "guillotine" any questioning and for the most part the representatives were able to ask their questions within their estimates. It was only the cross-examination of Mr Simpson that overran. I allowed it to do so by a considerable margin while nevertheless finding it necessary to query the relevance of some lines of questioning and to ask Miss Mechan to move on to other topics when questioning became repetitive. While she might not have appreciated those interventions I felt they were necessary to maintain a focus on the agreed list of issues and to ensure that there was a reasonable rate of progress through the evidence.

24. Similarly, I discussed with the representatives fair limits for oral submissions, particularly given that both proposed to rely upon written submissions. Miss Mechan said that she would require up to an hour to make her oral submissions and as it turned out she used all of that time. I made it clear that I regarded the time limit as generous and that I was therefore unwilling to allow her to overrun, referring to rule 45. Mr McLaughlin requested up to 40 minutes but completed his oral submissions in less time than that.

Burden of Proof

25. The claimant has the burden of proving that she was constructively dismissed. She must prove the necessary facts on "the balance of probabilities", that is on a "more likely than not" basis. If I decide that something is more likely to have occurred than not, then it is deemed for present purposes to have

occurred. Conversely, if I decide that it is more likely that something did not occur than that it did, then it is deemed not to have occurred for present purposes.

Findings of Fact

26. Having heard the evidence and the parties' submissions I made the following findings of fact on the balance of probabilities.

27. I have already set out above the essential factual background. I incorporate that summary into these findings of fact. Against the background of that chronology I now consider some of the key incidents in the case.

Productivity concerns

28. It was the respondent's case that there were concerns about the claimant's productivity and that this was part of the reason for wanting her to alter her working pattern. It was suggested that the claimant was easily distracted, was chatty and spent too much time on her phone. Ms Fraser did not shrink from describing the claimant as "lazy" on occasions.

29. There had been neither formal nor informal action to deal with productivity concerns. No capability or disciplinary processes had been commenced. The claimant had not been spoken to about productivity concerns at all. While I was shown a few pages which allegedly demonstrated that the claimant got through less work per week than some of her colleagues, those documents were in no sense a comprehensive set and had relatively little probative value taken in isolation. They were insufficient for me to make adverse findings about the general level of the claimant's productivity.

30. I find that any concerns the respondent might have had about the claimant's productivity were at a low level and had not been communicated to the claimant. They were not serious concerns and it was striking that the respondent had taken no action to address them. The failure to do so

suggests that the gravity of the concerns has been exaggerated at this hearing. It was also unclear how asking the claimant to work over 2.5 days a week instead of 2 would have addressed productivity concerns.

Wednesday mornings

31. However, I do accept the respondent's evidence regarding difficulties that arose regarding the level of cover on Wednesday mornings. The section was organised such that certain tasks were carried out earlier in the week (for example, arrears) while other tasks tended to take place later in the week. While Wednesdays were generally less busy days than Mondays or Tuesdays the respondent also had fewer staff to carry out work on Wednesday mornings. On alternate weeks one member of the team was seconded to cover duties elsewhere, which aggravated the problems on those Wednesday mornings. I accept that the respondent had genuine concerns about the level of cover on Wednesday mornings and that those concerns had a genuine factual foundation. Those concerns formed part of the reason for wanting the claimant to alter her working pattern to include Wednesday mornings.

32. The claimant was the only member of staff spoken to regarding an alteration in working arrangements so as to increase the level of cover on Wednesday mornings. While some staff were full-time and therefore working Wednesday mornings anyway, some job share staff worked from Wednesday lunchtime until the end of the week and certainly could have been asked whether they were prepared to work Wednesday mornings as well. However, I accept the respondent's evidence that this would have been problematic since it would have entailed either paying overtime or else creating an equivalent reduction in cover at another point in the working week.

Training

33. The respondent's evidence was that it would have been easier for the claimant to receive (and possibly also to give) training if she worked on Wednesday mornings. I found this evidence unconvincing for two reasons.

First, training could also have been given on Mondays and Tuesdays, which between them represented 40% of the working week. Second, the claimant had previously indicated a willingness to attend for training purposes on days she was not contracted to work. Training needs were therefore a weak justification for seeking an altered working pattern.

Preparation for the meeting on 29th August 2017

34. During the early afternoon of 29th August 2017 in preparation for the meeting with the claimant Maureen Beacom telephoned the respondent's HR department. She spoke to Edward Simpson. Sandra Fraser was also present in Maureen Beacom's room during that call. Maureen Beacom took notes of the call. They are not entirely easy to interpret. Clearly some passages reflect things that management wished to tell HR rather than advice received by management from HR.

35. The importance of the note is that it purports to record advice that the claimant's contract was for 17½ hours over 2.5 days rather than 2 days. If that were true then it would suggest that the default contractual position was precisely that which the respondent sought to achieve. However, the evidence of Maureen Beacom and Edward Simpson is not consistent regarding the advice given by HR. Mr Simpson thought that the note was an inaccurate reflection of his advice.

36. Either Maureen Beacom incorrectly recorded the information she received from HR or HR gave inaccurate information regarding the claimant's contract. Before looking at the detail it would be surprising if HR, who had access to the claimant's file, gave out inaccurate information. Having looked at the note, it clearly contains some information which can only realistically have come from the claimant's file. I conclude that Edward Simpson must have been looking at the claimant's contractual information when speaking to Maureen Beacom. That is the likely explanation for the fact that the note contains accurate dates for the claimant's two most recent contracts. It is difficult to believe that Edward Simpson was speaking from memory. If it is accepted

that he was speaking with access to the claimant's file then it is more difficult to accept that he made a mistake about the working pattern. I find on the balance of probabilities that it is more likely that management misunderstood and/or mis-recorded what they were told by Edward Simpson.

The meeting on 29th August 2017 – claimant's version of events

37. The claimant's version of events was as follows. She did not take any notes of the meeting.

38. The claimant was sitting at her desk just after 5pm when Sandra Fraser and Maureen Beacom approached her and asked for "a quick word". The claimant was taken into a separate meeting room and the managers sat on either side of her. The claimant had not been given any prior notice of the meeting and was not given the option of bringing someone else into the meeting as an observer or supporter. Until the meeting started the claimant had no idea what it would be about.

39. Maureen Beacom said that the claimant's hours needed to change and that the claimant would have to come in on a Wednesday morning. The phrase used was something like, "you will have to work 2.5 days as you have done before". In fact, the claimant had never worked her 17.5 hours over 2.5 days. The claimant referred to that fact and protested that she was being taken into a meeting in order to have her hours changed after three and a half years of working under a different arrangement. The claimant also stated that her contract was "permanent two days" and that she would have to seek further advice and look into the matter further. The claimant did not hear management say anything in response. The claimant then left the room. She was visibly upset.

40. The claimant was left with the impression that her working pattern was going to be changed and had no doubt about that. Her evidence was that the discussion was not simply an attempt to see whether she would agree to

change her working pattern.

41. While the respondent alleges that the claimant said that she would check her contract after the meeting the claimant denies that, saying that she had no need to do so since she was well aware of the terms of her contract. She gave evidence that she was completely confident of her contractual position whereas her managers were ignoring it. What she planned to do was to take advice.

42. The claimant made one important concession in cross-examination. She accepted that no change in working pattern had actually been imposed during the meeting on 29th August 2017. She confirmed her view that management *wanted* to implement that change and wanted to do so as quickly as they could, but that they had not done so at the meeting itself.

The meeting on 29th August 2017 – respondent's version of events

43. The respondent's version of events was as follows. Neither manager took any notes of the meeting.

44. Both managers laboured under two misapprehensions. First, they believed that the claimant had formerly worked 17.5 hours over 2.5 days, whereas the claimant had never worked on that basis. Second, they believed that the claimant's working pattern was a temporary flexible working arrangement and that it was overdue a review. Once again, that was wrong. While I accept that both managers honestly believed those things I am not satisfied on the balance of probabilities that there was a reasonable basis for them to do so. The claimant's contractual terms could easily have been established, either by requesting a copy of her contract or by seeking and receiving accurate advice from HR.

45. The respondent's case is that the intention of management was simply to find out whether the claimant would consider, or was interested in, changing her condensed hours arrangements "back" to 2.5 days. There was no plan to change the claimant's hours, the intention was simply to explore whether she

would agree to do so.

46. It was accepted that the claimant was not given any meaningful prior notice of the meeting or of its subject matter. The respondent's witnesses described it as "ad hoc". It was accepted that the claimant was not offered an opportunity to be accompanied. It was not meant as "that kind of meeting" and it was just a "get together" or a chat.

47. The two managers concerned often met staff together for what they described as "HR and more serious situations". Sandra Fraser regarded this meeting as one which she was not happy to deal with on her own.

48. The claimant indicated that she would not be interested in working her hours over 2.5 days and gave reasons. The claimant did not feel it was worth the effort and expense of coming in on the bus just for Wednesday mornings, she had been looking into college courses which might clash with Wednesday working and also mentioned that she had a permanent contract. It was agreed that the claimant would bring in her contract the next working day, which meant the following Monday, 4th September 2017. The claimant was told the reasons why management were exploring an altered working pattern. The claimant seemed upset, packed up her belongings and left the office. Management believed that the reason was that one of the claimant's animals was seriously ill. If the claimant had brought in her contract the following week then that would have been the end of the matter.

The meeting on 29th August 2017 – findings on the balance of probabilities

49. I find that the respondent made it very clear at the meeting that it wanted the claimant to change her working hours and that the claimant's unwillingness to do so was not immediately accepted as being the end of the matter. If it were true that the respondent had regarded the claimant's unwillingness to change her working pattern as determinative then it is difficult to see why the respondent would say in evidence that the matter would have been at an end if the claimant brought in her contract the following Monday. If the claimant's lack of consent had been treated as conclusive then there would not have

been any need to investigate contractual terms or to require the claimant to do anything further at all. The ongoing interest in the claimant's contract suggests that the respondent required convincing that it was not entitled to impose the change against the claimant's wishes, by insisting for example that the claimant reverted to the 2.5 day working week which the respondent erroneously believed to have been the position prior to the implementation of a flexible working arrangement. Similar comments could be made in relation to the decision to seek further advice from HR.

50. I find on the balance of probabilities that the claimant left the meeting with the clear impression that changes in working arrangements would be made unless she could persuade the respondent that it was not contractually entitled to make any such changes. I also find that this was a cause of significant distress to the claimant. While no change had been made at the meeting itself the claimant stood to lose a long-standing working arrangement against her wishes if she could not resist the respondent's plan.

51. However, I am satisfied that the respondent did not purport to implement any changes in the claimant's working arrangements during the meeting itself. Not only did the claimant accept that proposition during cross-examination, it seems to me that there would have been no reason for the respondent to have sought subsequent clarification of the contractual position if it believed that it was entitled to make changes at the meeting and that it had done so.

52. A further reason for my rejection of the respondent's version of events is the fact that concerns about the claimant's work ethic and productivity were, in my judgment, exaggerated for the purposes of this hearing. The alleged concerns sat uneasily with the complete failure to take any formal or informal action to manage the claimant's performance while she was still employed. Overall, I found that this damaged the credibility of Sandra Fraser and Maureen Beacom regarding events at the contentious meeting and I was therefore less inclined to accept their evidence.

53. Similar harm was done to the credibility of Sandra Fraser and Maureen

Beacom by their suggestion that the claimant was probably upset at the end of the meeting because of the ill-health of her pet. The claimant had not been upset at the start of the meeting and it must surely have dawned on them that she became upset just as they discussed with her an alteration in her working pattern. I viewed this as an attempt to explain away some uncomfortable evidence which caused me to doubt the reliability of their evidence regarding the rest of the meeting.

Whether the respondent was already aware of the claimant's position

54. In an earlier email dated 30th January 2017 sent by the claimant to Sandra Fraser in a different context the claimant had indicated that changing her working pattern wouldn't suit her. However, it does not seem unreasonable to me for the respondent to have raised the issue of working pattern again seven months later. Something might well have changed in the meantime and in any event the email had been sent in a different context to the one under consideration. The claimant's email of 30th January 2017 did not on its own make the meeting on 29th August 2017 inappropriate.

Clarification of the respondent's position following the meeting

55. Neither Sandra Fraser nor Maureen Beacom contacted the claimant at any point after the meeting on 29th August 2017 to confirm either their own intentions or the claimant's contractual position. While their evidence was that the claimant's unwillingness to alter her working pattern was the end of the matter so far as they were concerned (at least once they had received further advice from HR), they did not communicate that to the claimant.

56. However, while the claimant was off sick she made it clear that she did not want to be contacted by Sandra Fraser or Maureen Beacom. That was accepted by the claimant in cross-examination and it is reflected in Sandra Fraser's note of a telephone conversation between them on 13th September 2017. On the balance of probabilities I find that this is the explanation for line management's failure to contact the claimant in order to make the position clear. There is no doubt that management *could* have contacted the claimant

to clarify matters, but they chose not to do so because she was off sick and had expressed the wish not to be contacted. I find no evidence of a deliberate attempt to unsettle the claimant or to mislead her.

57. On 30th August 2017 management sought further clarification of the position from HR. They were informed that the claimant's contract was permanent and that no variation of its terms, including working pattern, was possible without the claimant's consent. From this point onwards management regarded the matter as being at an end. Management did not contact the claimant to say so (see above), although Human Resources did communicate to that effect at a much later stage (see below).

58. On 23rd October 2017 Mr Simpson (Senior HR Adviser) emailed the claimant in order to reply to an email that the claimant had sent to his colleague Fiona Sinclair on 20th October 2017.

    a. The claimant had asked, "*please advise whether my contract has been changed recently as I work condensed hours… My managers met with me on 29th August to advise my condensed hours would be ending and I would now be required to work Monday, Tuesday and Wednesday morning. However, I have being [sic] working these condensed hours since 31 March 2014. Can you send me a screenshot from MyView showing my hours please*". The reference to MyView is a reference to a human resources database which contains key contractual information.

    b. Mr Simpson was not able to access the claimant's MyView account but obtained the necessary information in other ways. He confirmed that, "*you remain on the 17.5 hours Monday and Tuesday and this is on a permanent basis*", before continuing, "*I have advised your service that if they wished to vary this arrangement, it can only be done in direct consultation and agreement with you or as part of an overall collective process such as a service review, so be assured that you remain on your 17.5 hours over the two days basis unless any due*

process is agreed either with you and/or your trade union to change that."

59. I find that the email from HR was clear and authoritative. The claimant accepted in cross-examination that it was absolutely clear from the email of 23rd October 2017 that her working pattern would not change but maintained that it had not been clear to her until then. I accept that.

60. On 23rd October 2017 the claimant replied saying, "*thanks for your reply and for confirming my hours haven't changed.*" However, the email went on, "*I am going to contact Mark Ferguson for further advice as I've been caused a lot of undue and unnecessary stress over this matter.*" Mark Ferguson was a trade union representative.

61. On 24th October 2017 Mr Simpson emailed the claimant again saying, "*you're welcome Kim. It would be good to get a meeting with you and your manager and Mark or Stephen with you to discuss anything at all that is still causing you concern or requires clarity. I can make myself available whenever we can agree something. I know Mark is keen to get things sorted out and get you back up and running again.*"

62. Later the same day the claimant indicated that she wished to raise a formal grievance and asked for clarification of the procedures. Mr Simpson obliged and several further emails were exchanged regarding that process. As will be clear from the chronology set out earlier in these reasons, by this stage the claimant had already decided to leave the respondent's employment.

63. On 8th November 2017 the claimant emailed Mr Simpson partly in response to an occupational health issue but also stating, "*I am still submitting a formal grievance as I feel I could still be at my place of work if my Managers had just left things as they were. I feel this was all totally unnecessary and I don't feel I can return to the workplace after I have raised a formal grievance. This is because I feel that this will prejudice me no matter what office I work within at Renfrewshire Council.*"

64. It therefore appears that, so far as the claimant was concerned, the obstacle to a return to work by then included the fact that she had raised a grievance. It is unclear whether by "*if my managers had just left things as they were*" the claimant was objecting to the fact that a discussion had been held at all or to an attempted change in her working arrangements. It was by this stage clear that there had not been any change to working arrangements and that in that sense things had indeed been "left as they were".

65. At this hearing the claimant accepted that there was nothing wrong in principle with management seeking to have a discussion about a possible alteration in working pattern, but she objected to the way in which it was done.

66. I have already summarised above the key dates in the claimant's search for alternative employment. By 9th November 2017 the claimant was pursuing a reference in that connection. She declined an offer of mediation but appreciated Mr Simpson's concern and efforts to find ways to help.

67. On 15th November 2017 the claimant notified Mr Simpson that she had been offered a job with another employer and that all necessary checks had been completed with a view to a start date of 4th December 2017. The claimant was interested in voluntary redundancy and early receipt of her pension, although there was no suggestion before me that she was entitled to either. She indicated that she would like to hand in her notice and asked about the procedure.

68. The following day, on 16th November 2017, the claimant submitted her resignation by email to Ann Bennett.

Legal Principles

69. I could not detect any real dispute between the representatives regarding legal principle. The sole issue in this case so far as liability is concerned is the question whether the claimant was constructively dismissed. If she was then the respondent does not argue that it was nevertheless a fair dismissal.

70. Section 95(1)(c) ERA 1996 provides that an employee will be regarded as dismissed if she terminates the contract under which she is employed, with or without notice, in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct. This concept is usually referred to as "constructive dismissal".

71. In order to establish a constructive dismissal it is necessary for the employee to show:

a. that her employer had committed a "repudiatory breach of contract", that is to say a significant breach going to the root of the contract, a breach of contract so serious that the employee is entitled to resign in response (***Western Excavating v Sharp*** [1978] ICR 221, CA);
b. that the employee did in fact leave because of that breach, rather than for some other reason (not a live issue in the present case);
c. that the employee had not "affirmed the contract", by delaying her resignation too long or by doing anything else which suggested an intention that the contract should continue (again, not a live issue in the present case).

72. The "implied term of trust and confidence" is a term implied by law into every employee's contract of employment. It is that neither party will, without reasonable and proper cause, conduct himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee (***Malik v BCCI*** [1997] IRLR 462, HL). Whether there has been a breach of that term is a matter to be assessed objectively rather than from the subjective standpoint of either party.

73. Every breach of the implied term of trust and confidence is a "repudiatory breach", that is to say a breach of contract so serious that the employee is entitled to resign in response to it (***Woods v WM Car Services (Peterborough) Ltd*** [1982] ICR 693, CA, ***Morrow v Safeway Stores*** [2002] IRLR 9, EAT). In relation to any other contractual term, whether express or

implied, the tribunal must ask whether the breach was sufficiently serious to entitle the employee to resign in response.

74. For these purposes a breach of contract may be an "anticipatory" breach or an actual breach. An "anticipatory" breach of contract is one the effects of which have not yet occurred, but which amounts to a clear intention to breach the terms of the contract in the future.

75. A repudiatory breach of contract, once complete, is not capable of being remedied or cured so as to preclude acceptance. However, an anticipatory breach of contract may be withdrawn or remedied at any time up until the moment of acceptance. The crucial distinction is between simply threatening or forewarning of a repudiatory breach and actually committing one (***Bournemouth University v Buckland*** [2010] ICR 908, CA).

Submissions

76. Both representatives relied on detailed written submissions which I read carefully both before oral submissions and also before preparing this judgment. The additional oral submissions could be summarised as follows.

77. On behalf of the claimant, Miss Mechan recited a good deal of the evidence and made criticisms of the credibility of the respondent's witnesses which are also set out in her written submissions. She accepted in the course of submissions that the alleged breach of an express term relied upon by the claimant was anticipatory in nature. It was also submitted that the management of the claimant's subsequent sickness absence was all part of what the claimant meant by "orchestrating" the meeting on 29th August 2017.

78. As I observed at the time, I have difficulty accepting that matters post-dating the relevant meeting can be part of "orchestrating" that meeting. "Orchestrating" connotes planning and arrangement.

79. Miss Mechan argued that the respondent was playing down the true nature of the meeting on 29th August 2017 because it represented a "botched attempt"

to vary the terms of the claimant's contract. She also highlighted inconsistencies in the evidence of the respondent's witnesses and suggested that Sandra Fraser was tailoring her evidence to explain away difficult evidence and to suit her own version of events.

80. On behalf of the respondent, Mr McLaughlin made clear, concise and focused submissions. He accepted that the alleged breach of an express term, if substantiated, was of a fundamental nature which went to the root of the contract. He also submitted that the respondent's decision to clarify contractual terms following the meeting of 29th August 2017 was a proper attempt to seek clarification and carried no negative connotation. Both managers were inexperienced in dealing with this type of issue. The only consistent evidence was that they were merely seeking to "scope out" the possibility of altered working arrangements in a conversation. While other people could have been asked to work additionally on Wednesday mornings that would either have required overtime or the creation of a gap in cover somewhere else. Ultimately it was a matter for management to choose how to address concerns about productivity and the lack of disciplinary action should not be surprising – it was not appropriate on the available evidence.

Reasoning and conclusions

81. I will begin with the crucial meeting on 29th August 2017. I have already set out my findings as to what, on the balance of probabilities, happened.

Breach of an express term

82. Having made those findings of fact, my conclusion is that matters did not amount to an anticipatory breach of an *express* term as to hours, days and patterns of work. Taking matters at their highest, the respondent was expressing a desire and an intention to alter working arrangements against the claimant's wishes in the future, *if contractual terms permitted that approach*. The words in italics are crucial. I cannot interpret events as amounting to an anticipatory breach of an express term when the respondent

sought clarification of the contractual position both before, during and after the meeting. Only an intention to proceed regardless, or a clear statement that the respondent would definitely breach the express term would suffice and matters were far more equivocal than that. Things had not reached the point of a settled intention to breach the contract.

83. Further, and even if I had found that matters amounted to a breach of an express contractual term, that breach was necessarily anticipatory. No one suggests that a change in working arrangements had actually been implemented in or prior to the meeting. That was accepted by the claimant and the claimant's representative accepted that the alleged breach was anticipatory in character.

84. Even on this alternative basis I find that there was no breach capable of acceptance by the date of the claimant's resignation. The reason is that the respondent had unequivocally retracted any intention to breach the contract that might have been communicated on 29th August 2017. Edward Simpson's email of 23rd October 2017 is absolutely clear that there had been no change and that there could be no change except through consultation and agreement with the claimant. The claimant replied in terms which indicated that she understood and accepted that assurance. Her resignation was not submitted for another 24 days.

85. For both of those alternative reasons the part of the claim based on an express term fails.

Breach of the implied term of trust and confidence

86. The approach to the implied term of trust and confidence is necessarily different. In addition to the claimant's complaint about the meeting itself she also complains about the failure to give her the opportunity to be accompanied, the lack of notice, and what she refers to as "probing questions". I have considered all of those arguments in order to assess objectively whether they amount to a breach of the implied term of trust and

confidence. I have not considered them in isolation, I have considered the cumulative effect. It is nevertheless necessary to deal with them individually in the following paragraphs for the purposes of explanation.

87. In my judgment the respondent should have allowed the claimant to have been accompanied as a matter of good industrial relations practice. I was not shown anything to suggest that the claimant had a statutory or strict contractual right to be accompanied, however the respondent clearly regarded the meeting as being of sufficient significance to justify two managers being present. If it was that important or sensitive then the claimant should also have been offered the chance to be accompanied. It would have given her the reassurance of knowing that she had an independent witness to what was said and, symbolically, it would mean that she was not outnumbered by managers sitting either side of her with no one else present. I therefore find that the approach adopted by the respondent did cause some damage to the relationship of trust and confidence. I also find that there was no reasonable cause for the respondent to harm the relationship of trust and confidence in that manner. I do not accept the explanation put forward that the meeting was just an informal chat which did not require the claimant to be given the chance to be accompanied.

88. For similar reasons, I find that harm was done to the relationship of trust and confidence by the respondent's failure to give the claimant any advance notice of the subject matter of the meeting. That is bound to have been disconcerting given the importance of the discussion to the claimant. It is notable that management regarded the subject matter of the meeting as a proper matter upon which to take human resources advice and as something requiring the attendance of two managers. In those circumstances the claimant should also have been given fair warning of the meeting, its scope and a chance to prepare for it. I find that there was no reasonable cause for the respondent's failures.

89. I do not accept that the claimant was asked inappropriate "probing" questions

during discussions. It was entirely appropriate for the respondent to explore not just the claimant's willingness to work on Wednesdays but also her reasons for not wishing to work on Wednesdays. I heard no evidence sufficient to persuade me that the questions were framed in an intrusive or insensitive way. Viewed objectively, I find that no damage was caused to the relationship of trust and confidence on this account. Further, there was reasonable cause for the respondent to ask those questions.

90. As for the content of the meeting itself, I find that the respondent conducted matters in a clumsy and ill-considered way which was always likely to upset and unsettle the claimant. I find that the claimant was given the clear impression that changes to her contract were management's objective and that they would be to her detriment. She was put in a position where she felt that insufficient regard was being had to her contractual rights. Management should have acquired a full and accurate knowledge of the contractual position before the meeting. For whatever reason, their understanding was not accurate. All of these things did harm to the relationship of trust and confidence and there was no reasonable cause for the failures.

91. I reject the submission that the management of the claimant's occupational health referral or her sickness absence in general formed part of the "orchestration" of the meeting on 29th August 2017. They post-dated it. They cannot be regarded forming part of the alleged breach of contract.

92. I have assessed the cumulative effect of those failures. In my judgment they are not trivial. However, I find that they do not reach the level required to substantiate a breach of the implied term. While I readily accept that some damage was caused to the relationship of trust and confidence without proper cause, I find that it did not reach the level of "serious damage" still less "destruction" of the relationship. The House of Lords in ***Malik*** set the height of the bar by using those phrases and I find that the cumulative effect of the respondent's shortcomings in this case fell short of the level required.

93. For all of those reasons my conclusion must therefore be that there was no extant fundamental breach of contract at the date of the claimant's resignation. It follows that her resignation cannot have accepted a fundamental breach of contract and that she was not constructively dismissed. In the absence of a dismissal the claim for unfair dismissal must fail.

94. I want to conclude these reasons by saying that I fully understand that my decision will be a huge disappointment to the claimant. I have no doubts about her honesty and sincerity when giving evidence. Similarly, I have no doubt that she was very genuinely and significantly upset by these events. However, the legal tests I have outlined must be applied objectively rather than subjectively. That is why the claim has failed despite the genuine distress caused to the claimant by the respondent's handling of matters. In essence, I have found that although the claimant resigned in response to events which genuinely upset her, those events did not amount to a breach of her contract and therefore that she was not constructively dismissed.

Employment Judge: M Whitcombe
Date of Judgment: 24 August 2018
Entered in register: 30 August 2018
and copied to parties