



EMPLOYMENT TRIBUNALS

Claimant: Ms Isabel Daniel

Respondent: Iceland Foods Ltd

Heard at: London South **On:** 11 April 2019

Before: Employment Judge Martin

Representation

Claimant: In person

Respondent: Mr Owen - Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The Claimant's claim of unfair dismissal is dismissed

REASONS

1. By a claim form presented to the Tribunal on 22 October 2018 the Claimant claimed she had been unfairly dismissed. The Respondent defended the claims in its response dated 19 December 2018 on the basis that the Claimant resigned, and it did not dismiss her.

2. The issues for the Tribunal to determine were:

Heat of the moment resignation/unfair dismissal

2.1 Did the Claimant resign from her employment, verbally or by text message on or before 7 July 2018? Alternatively, did the Claimant resign in the heat of the moment so that the Respondent could not rely upon the resignation?

2.2 If the Claimant did resign in the heat of the moment, did the Respondent to give the Claimant a reasonable amount of time to reflect on the resignation before accepting it?

2.3 If so, did the Claimant indicate to the Respondent by her conduct that

she still wished to resign?

- 2.4 Did the Claimant rescind her resignation before the Respondent accepted it?
- 2.5 If so, did the Respondent dismiss the Claimant?
- 2.6 if the Respondent did dismiss the Claimant, was the reason for the dismissal fair in all the circumstances?

Constructive unfair dismissal-section 95 (1) (c) Employment Rights Act 1996

- 2.7 Did the Respondent constructively unfairly dismiss the Claimant? If so, did the Respondent breach the Claimant's contract of employment such that the Respondent's conduct was of a manner likely to destroy or seriously damage the relationship of trust and confidence between the parties?
- 2.8 Was a breach sufficiently serious to justify the Claimant's resignation?
- 2.9 Did the Claimant resign in response to the alleged breach?
- 2.10 Did the Claimant waive any breach by her conduct/actions?
- 2.11 Did the Claimant delay too long in accepting the alleged breach?

Remedies

- 2.12 If any of the claims are upheld:
- 2.13 What is a compensation that the Claimant is entitled to in respect of financial loss?
- 2.14 Did the Claimant and/or Respondent failed to comply with the ACAS code on disciplinary and grievances?
- 2.15 If so, was the failure unreasonable?
- 2.16 If so, should any compensation awarded to the Claimant be uplifted/deducted and if so by how much

The Law

- 3. The law as relevant to the issues:
 - 3.1 s95 Employment Rights Act 1996 provides that an employee is dismissed by his employer if the contract under which he or she is employed is terminated by the employer (whether with or without notice) or 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.
 - 3.2 ***Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 CA***, held

that an employee would only be entitled to claim that he or she had been constructively dismissed where the employer was guilty of 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'. It was not sufficient that the employer was guilty of unreasonable conduct - he must be guilty of a breach of an actual term of the contract, and the breach must be serious enough to be said to be 'fundamental' or 'repudiatory'.

- 3.3 *Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347*** held that to constitute a breach it is not necessary that the employer intended any repudiation of the contract: the issue is whether the effect of the employer's conduct as a whole, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.
- 3.4 *Lewis v Motorworld Garages Ltd [1985] IRLR 465*** held that significant breaches by an employer of express terms of an employment contract, although waived by the employee, can still form part of a series of actions which cumulatively breach the implied obligation of trust and confidence.

The hearing

2. The Tribunal heard evidence from the Claimant. For the Respondent, the Tribunal heard evidence from Mr Roger Chapman (Assistant Store Manager, Mr Darren Dowd (Store Manager) and Ms Lin Nguyen (Trainee Store Manager). There was an agreed bundle of documents numbered to 131.
3. The Claimant had not prepared her questions for the Respondent witnesses and therefore an hour was given to her to allow her to prepare what she wanted to ask them.

The facts as found by the Tribunal

4. The Tribunal came to the following findings of fact on the balance of probabilities having heard the evidence and considered the documents.
5. At the start of the hearing the Claimant confirmed that she resigned by text in the heat of the moment due to the strain of events. She said that reinstatement was offered and then withdrawn. She confirmed that the breach of contract was a breach of the implied term of mutual trust and confidence and relied on the scheduling of shifts, denial of her holiday request, being bullied and not having a locker.
6. The Claimant worked in the cash office and accepted that there was a policy that required two members of staff to be present on a shift as at the end of the night shift he had to take cash from the tills to the cash office. There were three people working in the cash office admin team with two people required every night which meant that there were limited options in terms of creating a rota.

7. The Claimant started work for the Respondent at its Brixton store on 5 December 2014. Her employment ended on 17 July 2018. She was employed as a part-time sales assistant. The Claimant was also a student studying at college. Her employment ended by her verbal resignation on 15 July 2018 which was sometime confirmed between 15 and 17 July 2018 when the Claimant contacted the Respondent by text message confirming that she was resigning with immediate effect. The effective date of termination was 17 July 2018. The Claimant accepted that she did not make a grievance about the rota, locker or annual leave. The Claimant's position in cross examination was that she went to human resources only after she had tendered her resignation.
8. The events leading up to the Claimant's resignation followed the refit of the Brixton store in May 2018. The store reopened on 19 May 2018 and on 1 April 2018 there was training for the cash office on new procedures. The Claimant was given a letter that day with the changes in policies and her terms of contract.

Lockers

9. The Claimant's position is that she was denied a personal locker after the Brixton store reopened and that she had personal items in her locker which were removed during the refit and not returned to her. The Respondent's position is that there was no specific policy to say that everyone would have their own locker although the Claimant says this was the culture in the store. The Tribunal accepts that this culture existed even if there is no specific policy. The Respondent also stated that there were the same number of lockers after the refit as there had been before and there was no evidence to refute this.
10. The Claimant accepts that all the lockers were removed and accepts that there were notices on the lockers a week or more before asking staff to remove their items. The Claimant accepted that there was no reference in the bundle or any other record that she complained to the Respondent about the lack of a locker. Her position is that she complained to her managers orally and mentioned that they told her off about bringing bags into the office which they said was irregular. The Respondent's position is that the Claimant did not complain about the lack of a locker and that they thought she had access to one. On balance the Tribunal accepts the Respondent's evidence.

Rota

11. The Claimant complained to her managers about what she considered to be poor rota planning between April and July 2018 complaining about disruptions caused to her studies resulting in an overpayment to her student finance. The Claimant had a meeting with Mr Chapman in June 2018 where the rota was discussed. Because the cash admin team had concerns about the way the rotors had been arranged Mr Chapman asked them to come up with an idea of how they thought the rota could work bearing in mind they need to be two people on the shift at any one time. The Claimant and her colleagues created a draft to achieve a consensus.
12. The Claimant asked for at least four shifts per week and not to work every Sunday. The Claimant says she did not mind working Sundays but did not want to work every Sunday continuously. The Claimant thanked Mr Chapman for his assistance.

13. The Claimant conceded in her cross examination that the Respondent did give her what she wanted in terms of four shifts a week and not working every Sunday albeit saying that that was because of her persistence.
14. The Claimant's witness statement also states that she disclosed her concerns about poor rota planning at cash office meetings saying that if managers did not give consideration or act, she would apply to work in another branch to avoid the current working conditions. Her manager, Mr Chapman, by her own account, said that he was doing his best to help the situation regarding the rota planning. The Respondent's position is that there were no last-minute changes to the rota with only last minute change being made by the Claimant who texted to say she was unable to attend work that evening (page 43 of the bundle). The Respondent's position is that given that there were three people working in the cash office, and that there needed to be two people working at the same time, their options in terms of flexibility were limited. The Respondent's says that it tried to accommodate the Claimant's wishes against the business constraints it was working under.

8 July 2018 "outburst"

15. The Claimant refers to an incident on 8 July 2018 between herself and her manager Mr Dowd on the shop floor during which Mr Dowd's son was present. In a statement she says: **"I had an outburst due to disregard of management tools grievances reported and clarified him with relation my notice on the previous day"**. Mr Dowd did not accept that there was an outburst or an incident as described by the Claimant. His evidence was that the Claimant walked past him and said something which he could not hear and that there was nothing as emotional as an outburst.
16. The Claimant signed a contract of employment on 9 January 2015 which sets out the procedure for asking for holiday namely that it has to be booked in advance two to three weeks before it is required, and holiday was granted on a first-come first-served basis. The Claimant accepted this. The Claimant also accepted that the Respondent needed to have enough staff at work because of business needs. The Claimant's witness statement suggests that this was a change in policy which she did not agree to, however the Tribunal finds that this was the policy from the start of her employment as confirmed in her contract and as is normal practice in most organisations.
17. An issue arose in relation to the Claimant's request for holiday which was refused. The Respondent's case is that the Claimant spoke to one of her managers Mylan, who explained that the reason her holiday request was denied was because other staff had already been granted leave. The Claimant said that Mylan explained that the policy was first come first serve and the Claimant's position was that had not been the case previously. When asked by the Tribunal whether the Claimant accepted that a manager could say that a member of staff could not have holiday during due to business needs, putting aside the terms of the contract, the Claimant said that she could accept this. The Claimant accepted that she would not be aware she was the 1st to request holiday or had requested holiday after others. The Tribunal finds that the Respondent acted reasonably and in accordance with the contract and its policies.

Resignation

18. The Claimant first tendered her resignation on 7 July 2018. There is a dispute about whether the Claimant was working or not and the Claimant said she had to go into cover someone else's shift.
19. The Claimant accepted that she sent a text to Mr Chapman saying she was giving a week's notice, which has her contractual obligation, and that she also sent a similar text to Mr Dowd as well. Her text said: **"I'm giving my notice will be leaving a week from, now. Thanks Isabel Daniel"**. The Claimant's position was that this was an "outburst" that she was tired and exhausted with her schoolwork which is why she sent these texts.
20. Later that day the Claimant describes how she spoke to a colleague about her concerns and suspicions of bullying by two managers. As a result of this conversation the Claimant called Human Resources on 9 July 2018 from college and reported her grievances saying she felt bullied by the new management.
21. After she resigned the Claimant spoke to human resources and her evidence is that on 15 July 2018, she apologised to Mr Dowd for her "outburst". There is a conflict of evidence about what happened on 17 July. The Claimant says that she called to say that she was unwell, the Respondent said that she did not complain of ill-health. The Respondent deny that the Claimant revoked her resignation.
22. On 10 July (page 60 to 61) the Claimant raised a list of concerns which she gave Human Resources as she said they had not been resolved with management. They did not mention revoking her resignation. The Respondent's position is that they attempted to call the Claimant, but she did not answer her phone. The Claimant said that she did not have her mobile as she had been the target of identity fraud; this was disputed by the Respondent. This is the reason that the Respondent says that the Claimant was not reinstated namely that they had tried to get hold of her, but she did not respond. The Claimant appears to accept this as she says she did not have her mobile phone and did not tell the Respondent about this. The Tribunal accepts the Respondent's evidence that it tried to get hold of the Claimant.
23. The Tribunal finds that the Claimant gave verbal notice of her resignation between 15 – 17 July 2018. She was recorded as leaving on 17 July 2018.
24. On 17 July 2018 she reported sick and did not attend work.

Reinstatement

25. In August 2018 the Claimant had a meeting with Mr Dowd where her reinstatement was discussed. Mr Dowd told the Tribunal that he was happy for the Claimant to return to work but needed to check the process given her resignation. He told her he would get in touch with her and tried to telephone however she did not pick up his calls. The Claimant said she had been a victim of identity theft and did not have her phone. The Tribunal is satisfied on balance that Mr Dowd did try to call her and for whatever reason was unable to make contact.

The Tribunal's conclusions

26. Having found the factual matrix as set out above the Tribunal has come to the following conclusions on the balance of probabilities.
27. The Claimant resigned voluntarily and was not constructively dismissed. The Tribunal has found that the Respondent acted reasonably and has rejected the matters which the Claimant says meant she had to resign. The Tribunal does not find this to be a resignation in the heat of the moment as the Claimant alleged. The Claimant sent a text to both of her managers which indicates that she meant it when she gave her notice. There is no evidence of the Claimant rescinding her resignation. The Respondent says she did not and on balance the Tribunal found the Respondent's evidence to be credible and accepts their evidence.
28. The Tribunal does not find that the Claimant has made out her claim of constructive unfair dismissal. There is no evidence that the Respondent breached her contract of employment as alleged which would entitle her to resign and complain of unfair dismissal. The Tribunal further finds that the Respondent acted fairly and reasonably in trying to contact her to discuss reinstatement further which had been discussed in August. The Claimant did not tell the Respondent she did not have her phone anymore and therefore the Respondent cannot be criticised for trying to contact her but failing to do so.
29. In all the circumstances the Claimant's claim is dismissed.

Employment Judge Martin

Date: 19 August 2019