Case Number: 1803801/2020 (V)

EMPLOYMENT TRIBUNALS

Claimant		Respondent
Ms Whitney Horner	**V**	**Hytal Kitchens & Bathrooms Ltd**

Heard at: Leeds (via CVP) **On: 08 January 2021**

Before: Employment Judge R S Drake

Appearances
For the Claimant: In Person
For the Respondent: Ms S Ashraf (Consultant)

RESERVED JUDGMENT

1. The Tribunal finds that the Claimant was not dismissed either expressly or impliedly/constructively as defined by Section 95(1) of the Employment Rights Act 1996 ("ERA") for the purposes of his claims under Section 94 ERA.

2. Therefore, the claim of unfair dismissal fails and is dismissed. The effective date of termination of employment (by the Claimant's voluntary resignation as I find it to be) was 16 June 2020.

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals.

This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V - video. It was not practicable to hold a face-to-face hearing because of the Covid19 pandemic.

REASONS

The Claims and the Issues

1. The Claimant was not legally represented. Therefore, I took special care to ensure that the parties' explanation of their respective cases, their cross examination, and their understanding of the complex CVP procedure were fostered by my assistance and intervention when necessary. I reserved my conclusions and therefore set them out with Reasons in full now in writing.

2. I heard oral evidence from the Claimant herself and a witness Ms Karen Clark (an ex-work colleague and current friend) given by way of taking as read two written statements both dated 30 November 2020 respectively, supported by supplementary testimony, cross examination, and reference to a number of documents in an agreed bundle comprising over 150 pages in total. I also heard evidence for the Respondents from Ms Joanne Best a Director and Ms Lisa Hill her sister but not an employee of the Respondents. Their testimony was also in the form of written statements both dated today's date, supplemental oral evidence, cross examination (with which I assisted the Claimant) and reference to a number of documents in the agreed bundle.

3. I had before me the claims which are as follows.

   3.1 The Claimant (a Showroom Assistant/Administrator) complains of unfair dismissal in that she says she resigned in circumstances in which she was entitled to resign without giving notice because of the Respondent's conduct;

   3.2 The Respondent company (an eponymously named Kitchen and Bathroom design and installation company) resists these claims asserting that the Claimant voluntarily resigned in circumstances not amounting to unfair constructive dismissal, but that if there were a dismissal, it was fair in that it was because of reasons related to her conduct;

   3.3 Further the Respondent assert that it acted fairly, and that it acted reasonably in relying on the reason it can show as being sufficient for dismissal;

   3.4 However, the Respondent's primary and main assertion is that the Claimant resigned and was not dismissed, and is therefore not entitled to claim either unfair (or wrongful) dismissal;

   3.5 As stated above, the Respondent denies this claim on the basis that it says (via Ms Best) that the Claimant resigned on 16 June 2020 (or later confirmed or otherwise occurred) on 3 July 2020 and had not returned to work since commencing absence from 16 June 2020.

   3.7 The Tribunal had to determine the further following issues: -

3.7.1 Did the Claimant orally resign on 16 June 2020?

3.7.2 If not, did she resign on 3 July 2020?

3.7.3 If the Claimant was not dismissed expressly, did the Respondent commit a breach of a fundamental term of her contract, and if so, did the Claimant react by terminating her own employment in good time in response only thereto?

The burden of proof of entitlement to compensation for unfair dismissal where dismissal is denied, (and for damages for breach of contract and all other heads of claim in this case) rested with the Claimant. If the Claimant established dismissal, then the burden of proving what the reason was for dismissal and that it was potentially fair and lawful rested with the Respondent. I explained all this to the Claimant being as she was unrepresented. I also heard detailed submissions by both sides after evidence, and I will refer where relevant to each of those.

The Law

I set out passages from statute and case law relevant to the issues in this case leaving out extracts which are not.

4. **Section 95(1)** of the **Employment Rights Act 1996** ("ERA") provides that: -

"for the purposes of this part of this Act, an employee is dismissed by his employer …. only if

(a) the contract under which he is employed is terminated by the employer (whether with or without notice) … (*my emphasis – this is not argued in this case)*
(b) …
(c) The employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct … "(*again my emphases*)

5. Section 95 (or its predecessor in identical statutory enactment) is elaborated and explained by the celebrated decision of the Court of Appeal, Lord Denning MR presiding, in **Western Excavating (ECC) v Sharp [1978] ICR 221**. In that case Lord Denning said and held as follows:

"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 and he is constructively dismissed"

This case is also authority for the proposition that the breach must be the direct cause of the resignation and resignation must be timely.

6. Further guidance is set out in the Court of Appeal decision of **Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA Civ 978** at para 55 which advises the posing of the following questions:-

"(1) What was the most recent act or omission on the part of the employer which the employee says caused or triggered her resignation?

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

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

(4) if not was it nevertheless a part of a course of conduct comprising several acts and omissions which viewed cumulatively amounted to a remain repudiatory breach of the implied term of trust and confidence?

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

7. By reason of my findings below, I am not setting out the full content of **Section 98** ERA (which provides for what an employer must show if dis missal has occurred) since it is unnecessary to do so unless dismissal were or had been proved.

The Facts

8. I find that all witnesses gave their evidence to me sincerely and in the belief, they were being truthful. I applaud the Claimant especially as much of her testimony, both written and oral, materially damaged the viability of her claim, but she stuck to it despite me giving her opportunity to modify or explain certain key admissions better to her advantage. Remarkably, there was little or no conflict of evidence apparent in relation to most of, but unfortunately not all, the key issues as identified above, those issues being what was said at a meeting between the Claimant and Mrs Best for the Respondents on 16 June 2020.

9 The facts I find are as follows and for the reasons described: -

9.1 The Claimant was employed by the Respondents from 25 August 2015 until she orally resigned on 16 June 2020 without giving notice, or otherwise when she resigned in writing on 3 July 2020, purporting to give one week's notice;

9.2 Relations between the Claimant and Ms Best, the principal director of the Respondents, seem to have been cordial and amicable up to 10 June 2020 despite some minor differences of view not uncommon and not untoward in any informal working relationship operating in a close-knit community such as, in this case, Morley near Leeds; Nothing preceding the events of the weekend 13 and 14 June forms the subject of the Claimant's claim in her ET1 and is not apparently relied on or argued as a basis for being a chain of events leading to the events of 16 June being a last straw;

9.3 The one matter preceding this weekend which is relevant is that Ms Best began to harbour suspicions that the Claimant was "moonlighting" by working without permission for another employer called "Room 94" – this suspicion was fuelled by her seeing a number of pictures on social media depicting the Claimant at Room 94 during working hours;

9.4 On Friday 12 June 2020 the Claimant, though knowing she was contractually obliged to give several days' notice of any request for leave, asked Ms Best for a day's leave for Monday 15 June – she did not expect but to her surprise nonetheless received Ms Best's consent if only because the latter was aware that the Claimant had recently moved to a new house and needed time to make post move adjustments;

9.5 The Claimant took exception to then receiving an email message from Ms Best timed at 20.43 Friday 12 June confirming permission to take leave on Monday 15 June - the reasons stated for taking exception are that the Claimant considers it unreasonable -

> 9.5.1 to receive a message sent to her home email despite not being at work to receive it on work email, and having received messages at home in the past - and that -
>
> 9.5.2 it was sent outside normal working time, despite Ms best being keen to ensure that she provided the Claimant with a proper audit trail for verifying the previously oral permission;

9.6 The 12 June email (P110) also asks the Claimant to remember that the normal protocol in the Company Handbook for seeking leave requires the giving of 4 weeks' notice;

9.7 Ms Best sent another email Saturday 13 June asking the Claimant to confirm her new address following her house move, and pointing out to her that it was understood she may be working at Room 94 without permission and reminding her of the terms prohibiting other employment as set out in her General Terms & Conditions – this included reminding her that breach of this obligation "could" (not "will" or "shall") result in termination of employment; the Claimant apparently also took exception to being asked to confirm her new address but more particularly to being reminded of her legal/contractual obligations in relation to other work;

9.8 On her return to work on Tuesday 16 June, the Claimant met Ms Best in and had a discussion both had wanted to initiate but for different reasons; the Claimant wanted to tell Ms Best that she had been caused distress over the weekend by the exchange of emails, and Ms Best wanted to raise her suspicions about the Claimant possibly "moonlighting" which were also based on discovery of material on her work computer over the weekend pointing in this direction – these subjects were indeed discussed, initially without rancour;

9.9 Ms Best explained that she was keen to ensure that by sending an email to her home over the weekend, the Claimant would have formal written confirmation of permission to take 16 June as leave and that there was nothing untoward or objectively stressful about communicating in this way at this time; the Claimant denied moonlighting explaining that she was merely visiting or helping out a friend at Room 98, but she became apparently red-faced and embarrassed at the suspicion explained to her by Ms Best, from which point in the dialogue relations became strained;

9.10 The discussion ended rather acrimoniously, in contrast with past dialogues, and there exists a conflict of evidence as to what happened in part; the Claimant says Ms Best raised her voice and wagged her finger at her, whereas Ms Best denies this – the Claimant's version is not verified by the third party who was in attendance (Mr Williams) who was not called here today to corroborate her – I find Ms Best's account preferable as more likely to have been the case, because of absence of corroboration of the Claimant's case which is hers to prove, not for Ms Best to disprove;

9.11 On the Claimant's own case (her statement paragraph 56) she says –

"I got really upset at this point … I said do you know what, this is my notice, I'm done, I don't know what else to do … (she said) can I have that in writing please? I said yes, I'll email it to you … I got up and started to walk out and then she said do you want to have a think about it …" (*my emphasis*)

9.12 The Claimant was then given permission to be absent with leave which then became based on illness certified by her Doctor, and indeed she never returned to work formally thereafter;

9.13 Ms Best suggested (P145) a welfare visit and initially the Claimant agreed that the former should visit her at her home on 6 July 2020 – this arrangement was modified by Ms Best (P149) that as social distancing was still advisable, the meeting be undertaken by video conference and be moderated by a consultant from the Respondent's advisors, but the Claimant again took exception to this and regarded this to be too formal and unnecessary just like all the previous communications she had received over the 12 June weekend;

9.14 On 3 July 2020, the Claimant wrote an undated letter to Ms Best (P151) which includes the following passages:

> 9.14.1 "… The informal welfare meeting will now be chaired by an impartial consultant … this is not what we originally agreed … "
>
> 9.14.2 "… I'm currently off work due to work related stress and this change to the meeting has now caused me further anxiety and distress …"
>
> 9.14.3 "… I have consulted my doctor who advised that I offer you my resignation with one-week notice …"
>
> 9.14.4 "… This whole situation was created by your insistence of the following of protocol with regard to requesting holiday which you had already authorised, and on returning to work you chose to confront me in a very aggressive manner …"
>
> 9.14.5" … I have been made aware that a job advertisement has been posted online with a for a vacancy that looks more like my role … "
>
> 9.14.6 "… I have no alternative but to leave the company after how my situation has handled … please take this as my resignation as showroom assistant ... "

9.15 The Respondent's had advertised a job, but they say it was another ex-employee's job (Ms Clark) which they had changed and modified to suit changed needs, and that it was not the job of the Claimant, but I find that even if it was (which I do not find), it post-dated the Claimant's oral resignation 16 June;

9.16 The Claimant's state of health became known to many of her friends/contacts via social media and at her behest because she did not prevent them and indeed contributed to them - however, she says she objects to Ms Hill (Ms Best's sister) referring to her state of health (and the suspicion she was moonlighting and "pulling a sickie" – P158) and that this must amount to a breach of duty by the Respondents solely because of the family connection between Ms Hill and Ms Best; I found Ms Hill to be a thoroughly convincing witness ion saying she had been told nothing about the Claimant by Ms Best;

Consideration and Conclusions

10 Starting with the main issues as identified in paragraph 3.7 above I make the following findings applying the law to the facts:

10.1 The Claimant resigned orally on 16 June in clear and unambiguous terms as described by she herself in paragraph 56 of her statement. Whereas I recognise there were subsequent attempts by the Ms Best to get her to rethink, rescission of a resignation is not possible in law and is irrevocable to the extent that if parties do change their minds, they can do so but any return to or revival of employment is in effect a new employment (with continuity of the time between ending of one and starting of n new employment does not exceed 7 days) but in all senses in law, the Claimant's resignation was clear and complete as of 16 June 2020, so all else which she seeks to rely on thereafter has no effect in law as it postdates termination.

10.2 If I am wrong in this interpretation, then the letter sent 3 July 2020 (P151) is even more clear and unambiguous and constitutes resignation as of that date - but surprisingly with one-week notice which is inconsistent with the Claimant arguing she was entitled to resign without giving notice, which is an essential element of Section 95(1)(c) which she has to establish but, in this case, does not.

10.3 With regard to analysing whether the Claimant was entitled to resign without giving notice because of the Respondent's conduct, I turn to the further application of the law to the facts below.

11. Starting with the Kaur guidelines to interpretation of Section 95 (1)(c) ERA, I make the following findings applying them to the facts as found above:

11.1 The most recent events before 16 June 2020 which the Claimant says caused her to resign were the email exchanges over the preceding weekend. Alternatively, the most recent events before 3 July were the invitation to participate in a welfare meeting which the Claimant would have preferred at her home but which Ms Best suggested should be by video and be moderated by a third-party consultant. All subsequent events are irrelevant to what happened before and on these two key dates.

11.2 If the Claimant regarded herself as entitled to resign on 16 June, her subsequent conduct of continuing to justify absence on sickness grounds by supplying sick notes and he agreeing to a welfare meeting completely contradict her view that she was entitled to resign on 16 June and thus she affirmed her contract or waived any actions of the Respondent leading to that "first" resignation.

11.3 With regard to alleged repudiatory breach, my findings are as follows

11.3.1 The act of an employer communicating with an employee out of hours on her home email to enable her to have the comfort of knowing her leave was approved, cannot be regarded objectively as in any way untoward.

11.3.2 Nor can reminding her of her duty otherwise to use proper protocol, and nor can asking for confirmation of her new home address be regarded as unreasonable or untoward.

11.3.4 The best the Claimant could say was that to be asked these things caused her stress and were unnecessary, but she has not explained to my satisfaction why this is the case nor, nor why he subjective reaction to it is objectively justified, nor why I must regard such actions as repudiatory conduct.

11.3.5 None of the Respondent's actions undertaken by Ms Best before 16 June can be regarded as repudiatory breach of contract. Rather the Claimant betrays all the hallmarks of guilty conscience in regarding such communications especially reminding her of her duty not to work for another employer (which is s simple statement of legal fact) cannot be regarded as repudiatory breach.

11.3.6 The Respondent's actions after 16 June and before 3 July were simply to suggest and then seek to modify a welfare meeting and also to advertise a job which I have found was not the Claimant's job. I find they were entitled to do both and nothing about either betokens an intention not to be bound by the implied duty of trust and confidence and cannot be objectively judged to be untoward let alone repudiatory breach.

11.4 There is no course of conduct before either key date which I find to be untoward let alone repudiatory and none of them adds up to a course of conduct which gives rise to the last event being the last straw justifying resignation by the Claimant. Each of the acts complained of was of itself reasonable and not typified by any objective basis for finding an intention not to be bound by the mutual obligation of trust and confidence which exists in all contracts of employment. I find the same of the all the acts seen collectively and cumulatively.

11.5 The Claimant has weakened her case by relying on two separate resignations, because if she seeks to rely significantly on the latter mainly, then she cannot argue that the former alleged breaches were responded to in a timely way having let several days to pass from 16 June to 3 July.

Her second resignation was clearly expressed to be because of the intervening events.

12 The events which postdate 3 July, referring especially to the message recorded by Ms Hill, then my finding is that this is an irrelevance because it can have no bearing on whether either resignation was justified by that action at the time, as that action had not happened. I find that whatever Ms Hill said online was anodyne and fair comment, was not a breach of duty by the Respondents and could not be as Ms Hill is not engaged by the Respondent company, and in any event was based on what Ms Hill could see from the message traffic generated by sources other than Ms Best and/or the Respondents – more significantly whatever Ms Hill wrote postdates not only the events of 16 June but also the letter from the Claimant 3 July confirming resignation

13 Accordingly, I cannot find that the Claimant has established either that she was expressly dismissed (on either of the key dates) or that she was constructively dismissed for, in each case, the purposes of Sections 95 and 98 ERA.

14 I am satisfied, should I need to say so, that all parties have acted reasonably throughout these proceedings and all parts of the process leading up to their conclusion.

Employment Judge R S Drake

Signed 08 January 2021