EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106669/2022

Final Hearing Held at Dundee on 13 and 14 February 2023

Employment Judge A Kemp

Miss Iona McNab	**Claimant** **In person**
Tayside Contracts Ltd	**Respondent** **Represented by:** **Ms M Morrissey** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Claim does not succeed and is dismissed.

REASONS

Introduction

1. This Final Hearing was arranged to address a claim of constructive unfair dismissal. The claimant was a party litigant and Ms Morrissey represented the respondent. The claimant's mother attended with her for support.

Preliminary Matters

2. The claimant said that she had sent the respondent an email with her documents, which the respondent had not received. The claimant came with documents she wished to refer to, which the respondent read on the day of the Final Hearing, and confirmed that it was ready to proceed. One document was added to that, and the claimant was permitted to produce payslips and other supporting documentation on the second day on which she spoke and was cross-examined. She had produced a schedule of loss.

3. The claimant's documents had included what was a form of statement, and that was discussed initially. Ms Morrissey objected to it. It was explained that no order for that had been made, and the normal rule in Scotland was for evidence to be given orally, such that the claimant would do so without referring to that document in the first instance, but if any issue arose later in relation to it it could be considered. The claimant did in fact give oral evidence, and not ask to refer to it, save in submissions as noted below.

4. Prior to the hearing of evidence the Judge explained to the claimant how the Final Hearing would be conducted. He explained about giving evidence for all matters, and referring to documentation in the Bundles. He explained that the witness would be cross-examined, and that doing so covered firstly evidence that was challenged as to its accuracy but also if it did not cover matters understood to be within the knowledge of that witness but not covered in the witness statement. He explained that the Tribunal could ask questions, and that re-examination permitted further questioning on matters raised only in cross examination or by the Tribunal's questions. The Judge explained that after the evidence for the claimant was given, she being her only witness, the claimant's case would be closed and that the respondent's evidence would be given, and subject to the same process. Once the respondent's case was closed, it was only in exceptional circumstances that further evidence was permitted, and therefore this was the opportunity to give evidence whether oral or written. Following the closure of the respondent's case there would be an opportunity to make submissions on the law, the facts, and the application of the law to the facts, and the Tribunal would then

consider matters and issue a written Judgment, which would be sent to parties and then added to the online Register of Judgments. Neither side had any further issues to raise at that stage.

The evidence

5. The parties had prepared their own documentation in the form of two bundles, with some duplication, most but not all of which was spoken to in evidence. The claimant gave her evidence first, with supplementary evidence on the second day in relation to loss. For the respondent evidence was given by Ms Caroline Cruickshanks and Ms Kim Ewen.

The Issues

6. At the commencement of the hearing the Tribunal proposed the following as the issues in the case:

   (i) Did the respondent dismiss the claimant in terms of section 95(1)(c) of the Employment Rights Act 1996 ("the 1996 Act")?

   (ii) If so, what was the reason or principal reason for the dismissal?

   (iii) If that reason was potentially a fair one under section 98(1) and (2) of the 1996 Act was it fair or unfair under section 98(4) of that Act?

   (iv) In the event that the claim succeeds to what remedy is the claimant entitled?

7. The parties confirmed their understanding of and agreement to those issues.

The facts

8. The claimant is Miss Iona McNab.

9. The respondent is Tayside Contracts Ltd.

10. The claimant was employed by the respondent as a Catering Assistant from 20 August 2018.

11. The respondent has a policy with regard to Grievances, and a separate one regarding Bullying and Harassment. The claimant was aware of their terms.

12. The claimant initially worked in the kitchen at Blairgowrie High School. Her line manager was Ms Donna Murdoch, the Cook in Charge. Another member of staff working there was Ms Louise Brown, who was also a Catering Assistant.

13. The claimant had a number of health conditions which affected her ability to carry out her work, and which were subject to investigation in 2019. She had a number of absences as a result, and a series of meetings took place to address them. Her duties were adjusted because of that, and the days she worked were reduced. Her duties were also restricted to avoid heavy lifting or similar.

14. On 1 October 2020 the claimant sent an email to Kim Ewen of the respondent to make a complaint about how her line manager Ms Donna Murdoch, and others including the claimant, were treated at work, by Ms Brown and another member of staff Ms Angela Alexander. That issue was addressed by Caroline Cruickshanks, Facilities Officer, and her line manager Carol Haxton, Area Catering Supervisor. They had a meeting with the claimant shortly afterwards to discuss it, and suggested that the matter be handled informally, which the claimant agreed to. Staff were spoken to by Ms Murdoch, and discussions held with Ms Brown thereafter about the need to conduct herself professionally. During those discussions the name of the claimant as the person who had complained was given to Ms Brown and Ms Alexander. After that, Ms Brown did not speak to the claimant for a period, and made some disparaging comments in relation to her. That caused the claimant to be upset.

15. During the course of 2021 the claimant exchanged a series of messages with former colleagues and others discussing the situation at work. The claimant was unhappy at work, and felt isolated. She would sit in her car outside it and be concerned at going in. Ms Ewen was aware of that in around September 2021 when she spoke to her, stating that if she

wished to make a complaint formally she should put it in writing. The claimant did not do so.

16. On 1 November 2021 a meeting was held with the claimant with Ms Cruickshanks and Ms Ewen to discuss her sickness absences. The claimant was accompanied by her trade union official Mr Jim Cunningham. The claimant during that meeting raised matters in relation to how she felt at work, and events she said had taken place. Those matters were set out in a letter to the claimant dated 17 November 2021. It stated that Ms Cruickshanks was concerned at what the claimant had stated, and that she and Ms Ewen would be onsite over the next few weeks to address the points.

17. Ms Cruickshanks attended the kitchen unannounced on a number of occasions, and did not notice anything untoward when she did so. She observed Ms Brown speaking to the claimant, and doing so in an appropriate manner. Ms Ewen also observed the claimant and Ms Brown speaking to each other appropriately at work. Ms Murdoch confirmed to Ms Cruickshanks and Ms Ewen that she too had observed the claimant and Ms Brown interacting appropriately with each other at work.

18. In December 2021 the claimant and Ms Brown had an altercation in the changing room. A comment was made in relation to the complaint that the claimant had raised, and Ms Brown indicated that she would not speak to the claimant. When doing so Ms Brown raised her voice. Ms Anne Durkin was present for some of that meeting, and when the issue was investigated said that she had not heard any swearing. Ms Brown was spoken to informally by Ms Ewen about the need to behave professionally.

19. The claimant applied for two jobs with the respondent as Hub Supervisor in or around November 2021. She withdrew one of them, for Coupar Angus Primary School, after the greater size of that job was explained to her by Ms Ewen. The claimant had the opportunity to work in another location at Hill View Campus, Blairgowrie, for a period, gaining experience in the role of Hub Supervisors, which she did for the period of early January 2022 to early February 2022. The claimant had an

interview for the other job she had applied for, at Rattray Primary School, situated on the said Campus, held on 1 February 2022. She did not interview well, not giving good answers to questions asked. When she was informed that she had not been successful at that interview she asked to return to Blairgowrie High School to work there, although she could have remained at the other location, and may have been able to work outwith Blairgowrie High School on a more permanent basis. That was agreed to by the respondent. She returned to the said School on or around 8 February 2022

20. On 9 February 2022 Ms Ewen noted in her diary that she had attended the School regarding Ms Brown and communication. She did not note any other matter. The claimant had raised an issue that day with Ms Ewen that Ms Brown was not communicating with her. That was in the context of the claimant then partly working at a kiosk in the school called Barry Bytes, with Ms Brown working partly at another location called the Baguette Bar, but where they had some interaction in the main kitchen.

21. In June 2022 the claimant applied for another job at a restaurant near her home in Alyth. She was successful for that. She sent an email to Ms Cruickshanks on 14 August 2022 tendering her resignation, with her last working day to be 9 September 2022. In the email the claimant alleged that she had been forced into an untenable position, which included that “most recently” she had been “physically shoved out of the way” by Ms Brown, witnessed by Ms Murdoch, on 8 February 2022.

22. A meeting was held with the claimant on 23 September 2022 to discuss both her absences, and her resignation. Ms Ewen attended. The claimant chose to be unaccompanied. Ms Cruickshanks hoped to persuade the claimant to withdraw her resignation. They discussed the allegation of an incident on 8 February 2022. Ms Ewen stated that she had no recollection or note of that incident. After that meeting, Ms Cruickshanks and Ms Ewen spoke to Ms Murdoch who said that she did not have any recollection of the incident, and stated that had such a matter happened she would have recorded and dealt with it. Ms Ewen saw the diary entry for 8 February 2022 kept by Ms Murdoch which had

nothing in it. She also saw the entry for the incident in December 2021 which had been recorded. Ms Ewen would have recorded a physical pushing of a member of staff if that had been reported to her.

23. The claimant commenced a new role as a waitress at Nonnina's Kitchen on 1 November 2022. Its start was delayed as the claimant had suffered a facial injury, such that it did not start on or around 9 September 2022. The job lasted for six weeks. Thereafter she was in receipt of benefits including Universal Credit. She applied for a number of roles unsuccessfully. She commenced a new role on 3 February 2023 at Scotmid Ltd as a Customer Service Assistant.

24. Whilst employed by the respondent her earnings were £576.50 per month gross, and £544.79 net. A retrospective increase added £60.65 per month to those earnings. The deduction was solely for pension contribution of £37.71. At Nonnina's Kitchen her earnings were a total of £562.50, from which there were no deductions.

25. The claimant commenced early conciliation on 5 October 2022 and received the Certificate for the same on 16 November 2022. The Claim Form in this claim was presented to the Tribunal on 26 November 2022.

The claimant's submission

26. The following is a brief summary of the submission made. The claimant referred to the document she had prepared for her claim, and wished to emphasise that she enjoyed working with the respondent and thought highly of it. She felt unsupported by her line manager and supervisors, and there were numerous occasions when she had spoken to Ms Murdoch or Ms Ewen and they had seen her upset. There was not much investigation done. She had felt degraded as a person, and they did not care about her.

The respondent's submission

27. The following is again a brief summary of the submission made. The respondent had investigated complaints as and when made. There had been no grievance formally intimated. The respondent had acted

reasonably. The claimant's evidence had been inconsistent. She had returned to the school to work there at her request, for example. The test in law is not simply unreasonable conduct, although that was not accepted. The test had not been met. The claimant had not left in response to any breach. There had been a long delay before the resignation from the last alleged incident. The reality was that the claimant had obtained another job. Reference was made to ***Hadj v St Luke's Plymouth UKEAT/0095/12.*** There was no specific evidence of what the line manager had been told by the claimant in the period up to the resignation. The claimant's perception of matters was not the same as the respondent's witnesses.

The law

28. Section 95 of the 1996 Act provides, so far as material for this case, as follows:

> "**95 Circumstances in which an employee is dismissed**
> (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—
> ……..
> (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

29. Section 98 of the Act provides, so far as material for this case, as follows:

> **"98 General**
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify

the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

……

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."……..

30. The onus of proving such a dismissal where that is denied by the respondent falls on the claimant. From the case of ***Western Excavating Ltd v Sharp [1978] IRLR 27*** followed in subsequent authorities, in order for an employee to be able to claim constructive dismissal, four conditions must be met:

(1) There must be a breach of contract by the employer, actual or anticipatory.

(2) That breach must be significant, going to the root of the contract, such that it is repudiatory

(3) The employee must leave in response to the breach and not for some other, unconnected reason.

(4) She must not delay too long in terminating the contract in response to the employer's breach, otherwise she may have acquiesced in the breach.

31. In every contract of employment there is an implied term derived from ***Malik v BCCI SA (in liquidation) [1998] AC 20***, which was slightly amended subsequently. The term was held in ***Malik*** to be as follows:

> "The employer shall 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."

32. In ***Baldwin v Brighton and Hove City Council [2007] IRLR 232*** the EAT held that the use of the word "and" following "calculated" in the passage quoted above was an error of transcription of the previous authorities, and that the relevant test is satisfied if either of the requirements is met such that the test should be "calculated or likely". That was reaffirmed by the EAT in ***Leeds Dental Team Ltd v Rose [2014] IRLR 8, EAT:***

> "The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of…"

33. The law relating to constructive dismissals was reviewed in ***Wright v North Lanarkshire Council [2014] ICR 77***, which in turn referred to ***Meikle v Nottinghamshire Council [2004] IRLR 703*** on the issue of causation. The reasonableness or otherwise of the employer's actions may be evidence as to whether there has been a constructive dismissal, although the test is contractual: ***Courtaulds Northern Spinning Ltd v***

***Sibson and Transport and General Workers' Union* [1988] IRLR 305**, ***Prestwick Circuits Ltd v McAndrew* [1990] IRLR 191**.

34. Where it is argued that there was a final straw, being a last act in a series of acts that cumulatively lead to repudiation, that last straw must not be entirely trivial – ***Kaur v Leeds Teaching Hospitals NHS Trust [2018] IRLR 833.***

35. Delay in resigning may be fatal to the claim for such a dismissal – ***WE Cox Toner (International) Ltd v Crook [1981] IRLR 443,*** and ***Cantor Fitzgerald International v Bird [2002] EWHC 2736.***

36. If there is held to be a dismissal, there must then be consideration of what the reason, or principal reason, for that dismissal was, and if it was a potentially fair reason under section 98(2) whether or not it was fair under section 98(4) of the Employment Rights Act 1996 ***Savoia v Chiltern Herb Farms Ltd* [1982] IRLR 166.** It is possible, if somewhat unusual, for a dismissal under section 95(1)(c) to be fair.

37. In the event of a finding of unfair dismissal, the tribunal requires to consider a basic and compensatory award if no order of re-instatement or re-engagement is made, which may be made under sections 119 and 122 of the Employment Rights Act 1996, the latter reflecting the losses sustained by the claimant as a result of the dismissal. The amount of the compensatory award is determined under section 123 and is "such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer". The Tribunal may increase the award in the event of any failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures.

Observations on the evidence

38. The **claimant** had clearly been upset by some of the events at work, as evidenced by her being upset on occasion in the hearing, although in general terms she liked working for the respondent. She gave evidence that she genuinely felt was correct. She sought to be honest overall. She

has had a number of health difficulties, and sought to overcome them. It is clear that some of the difficulties she perceived came from the unfortunate provision of her name as the complainer to Ms Brown, one of two complained about. Ms Brown's reaction was not the best. It appears from the evidence before me that she did indicate to the claimant that she would not speak to her, and when spoken to about that by the respondent said that she would do so but only for work purposes and not socially. The claimant spoke about her feelings to Ms Ewen in September 2021. In December 2021 she raised her voice in the changing room, and was spoken to about that by Ms Ewen. There is some support for the claimant from the messages she produced, which date from 2021. It is obvious that the claimant was unhappy with those aspects of work. She presented as a most pleasant person. There are however some difficulties with the evidence, which I must consider, and are addressed below.

39. **Ms Cruickshanks** and **Ms Ewen** were both I considered credible and reliable witnesses. They gave evidence in a straightforward manner, and I considered that in so far as there were disputes with the claimant, their evidence should be preferred. It is appropriate to note that the respondent did not call Ms Murdoch, and did not produce all documents that they might have done including for example diary entries of matters in December 2021 and February 2022. I took account of that, as noted below.

Discussion

40. The first, and key issue, is whether or not there was a dismissal under section 95(1)(c) of the 1996 Act. That is a contractual test. The claimant has the onus of proof. In that regard it may assist the claimant if I explain that I made the decision on facts on the basis of the evidence I heard. I considered all of it, including some that was not before me, such as Ms Murdoch who did not give evidence but might have, and some documents that were not before me such as diary entries taken by the respondent. I considered matters on the basis of the balance of probabilities in this regard, which is not a perfect science.

41. I concluded that the claimant had not discharged the onus of proof that there had been a dismissal. That is for the following reasons:

(i) In her letter of resignation and claim form, she referred to the 8 February 2022 pushing allegation as the most recent incident. The evidence before me however does not support the claimant on that. The contemporaneous note from Ms Ewen records only communication concerns. I accept Ms Ewen's evidence, supported by Ms Cruickshanks, that that is what the claimant said to her and that had there been an allegation of pushing or the like, that would have been recorded and investigated. That accords with common sense. I do not find it likely from the evidence before me that the claimant reported on or around that date that Ms Brown had pushed the claimant out of the way on that date, as alleged in the resignation email.

(ii) The claimant did not at any stage present a formal grievance about the incident. She knew of the policies for that. She had trade union support. That no grievance was presented either generally or in relation to the 8 February 2022 allegation is a factor to consider when assessing how the respondent acted, but also in relation to what had happened.

(iii) The claimant alleged that she had told Ms Murdoch (who was said to have been a witness to the event) and Ms Ewen about it, but Ms Ewen denied that, and I considered that Ms Ewen was more likely to be accurate on that. I do so appreciating that Ms Murdoch was not called as a witness by the respondent, although she had material evidence that could have been given, and the diary from the School she kept was not before me. But taking account of all the evidence, the hearsay evidence of what Ms Murdoch said which although not the best evidence is still evidence I can consider, and the terms of Ms Ewen's diary entry which was made contemporaneously, I have concluded that the claimant's evidence on this is not sufficiently reliable to be accepted.

(iv) There is also no supporting evidence such as messages to former colleagues or friends produced to me from on or around 8 February 2022, which stands in contrast to those produced for 2021. The lack of that evidence therefore does not assist the claimant's position.

(v) The only written complaint made by the claimant was one in October 2020. It was focussed on how Ms Murdoch was treated, rather than how the claimant herself was treated. But having made one written complaint, it is even more surprising that no further such complaint was presented in writing either in relation to the 8 February 2022 incident, or otherwise.

(vi) The claimant could have remained at New Hills Campus in early February 2022, but chose to return to the High School location where Ms Brown worked. That is a surprising step to take if matters were as bad as was spoken to in evidence. There was the opportunity not to do so, and it was her decision to return. She took it as she had not succeeded in the job interview.

(vii) There was some inconsistency in the claimant's evidence. She alleged at one stage that she continued to raise concerns with Ms Murdoch from February to August 2022. But at a later point in her evidence she said that she did not do that, as there was no point because nothing was being done. It also appeared to me most unlikely that the claimant would apply for a role in June 2022, give notice in 14 August 2022 to expire on 9 September 2022, but only start on 1 November 2022 because the owner's partner had to give notice to leave the existing job and start working there. These and other issues, some noted above, made me consider that her evidence was less reliable than that of the respondent.

(viii) There was, I consider, material delay in the period to the resignation. That was in the context of no grievance or complaint about 8 February 2022 in writing. That delay was not I consider properly explained, with the sole reason given being financial

considerations which I do not consider to be adequate in this context and for that lengthy period. The authorities clarify that a decision requires to be made to stay or not reasonably promptly, and if one stays for such a period that indicates acquiescence (the Scots law equivalent of affirmation in English law). It appears to me that even if there had been the incident on 8 February 2022 as described by the claimant, her failure to raise a formal issue about that, and the fact that she continued to work for the respondent for over six months, combined to mean that she had acquiesced in any breach.

(ix) The reason for resigning was given as things being untenable at work, but no specific incident was referred to after 8 February 2022. It may well not have been particularly pleasant to work with someone only speaking to you on work matters, but that of itself may not fall within the respondent's policy on bullying and harassment. There was an incident in December 2021, which was addressed by Ms Ewen. I found that the allegation on 8 February 2022 has not been proved. If there were other factors at play, and the claimant alleged further acts and behaviour, the claimant did not bring them to the attention of the respondent in writing or sufficiently clearly in my judgment such that the respondent could be criticised for not addressing them.

(x) I infer from all the evidence that it was having the prospect of a new role that was the reason for the resignation rather than any possible breach by the respondent, but that was an opportunity to highlight the concerns that the claimant had. Although that was entirely understandable on a human level, it did not amount to a dismissal under the statutory provision.

(xi) In my judgment there was no material breach of contract by the respondent in any event. The investigations were undertaken informally. That was not inappropriate given that no formal complaint or grievance was raised, and no written complaint save in October 2020 when there was agreement to proceed informally, and for the issue referred to above. The claimant said in her

supplementary evidence that she had raised the position with HR late in 2020 or in January 2021. That had not been the purpose of the supplementary evidence, but I heard it. No document had been produced about that, and Ms Cruickshanks had not been asked about it in her evidence. The claimant accepted that she did not follow up on that and ask about it or do otherwise, such as raise a formal grievance. I did not consider that this aspect of the evidence assisted her position in light of those considerations. That was so long before the resignation, about a year and a half, as to be of very little influence, if any at all, on the matters that led to resignation. The respondent dealt with some concerns at a meeting in November 2021 and followed that up with a letter. But even at that stage the claimant did not raise a grievance or written complaint. That was in the context of Ms Ewen having told her about making such a complaint in September 2021. Ms Cruickshanks and Ms Ewen did keep an eye on matters, arriving at the kitchen unannounced on occasion, and they both saw a reasonable working relationship between the claimant and Ms Brown. They spoke to Ms Murdoch who had the same opinion. That does not support an argument of a lack of an investigation reasonably required.

(xii) If one accepts that the claimant raised from time to time her concerns about work issues with Ms Murdoch in the period between February 2022 and August 2022, there was no evidence of any specific matter that would put Ms Murdoch on notice that something more formal should be done, such as to raise it with supervisors or to commence some formal investigation or similar. There was no evidence of something that could be regarded as a final straw as that is explained in authority. It was also notable that the claimant only had a few days of absence in 2022 prior to her resignation, which were not obviously ones related to mental health concerns that might arise from bullying or similar behaviour.

(xiii) With the benefit of hindsight it is true that more could have been done, for example by having a meeting with the claimant and recording in writing all that she was saying, considering how to address that, and if there was sufficient to do so initiating a formal investigation. It is also true that the complaint from December 2021 might have been investigated more fully, with written statements obtained. But that is a form of best practice, is asking a lot where there is no written complaint or grievance, and not following best practice is not a basis for a dismissal in law under section 95(1)(c). The test is higher than that, requiring a fundamental breach of contract as explained above.

42. Taking all of the evidence I heard into account, and applying the law as set out above, I conclude that the claimant has not established that her resignation was in law a dismissal. The other issues referred to above do not therefore arise.

Conclusion

43. A dismissal has not been established by the claimant, and the claim is dismissed as a result. I do however wish to state that I appreciate that this outcome will be a disappointment to the claimant, who has had health difficulties, as well as an unhappy time at work with the respondent, and it is to be hoped that her new position works well for her.

Employment Judge : A Kemp

Date of Judgment : 16 February 2023

Date sent to parties: 20 February 2023