



EMPLOYMENT TRIBUNALS

Claimant:
Mrs A Price

v

Respondent:
Axis Parcel Service Limited

Heard at: Reading

On: 16 August 2018

Before: Employment Judge S Jenkins

Appearances

For the Claimant: Mr S Burrett of Counsel

For the Respondent: Mr P Mertens of Counsel

RESERVED JUDGMENT

1. The Claimant's claim of unauthorised deductions from wages is dismissed on withdrawal.
2. The Claimant was unfairly dismissed and her claim of unfair dismissal therefore succeeds.

REASONS

BACKGROUND

1. The claims originally made in this case were for unfair dismissal, on a constructive dismissal basis arising from the Claimant's resignation alleged to have been in response to the Respondent's breach of contract, and for unauthorised deductions from wages. In the event, at the outset of the hearing, the Claimant's representative confirmed that she did not wish to pursue her unauthorised deductions claim and it was therefore dismissed on withdrawal.

EVIDENCE

2. I heard evidence from the Claimant on her own behalf and from Amanda Turner, International Logistics Director, and Gary Smallbone, Finance Director, on behalf of the Respondent. I also read a statement from Mr Iain McArthur, an Audio-Video Forensics Specialist, with regard to his actions

in attempting to provide greater clarity to an audio recording of a conversation which played a significant role in the case.

3. With regard to documents, I considered those documents within the bundle, spanning 236 pages, to which my attention was drawn. I also listened to a recording of a conversation which formed a significant part of the Claimant's case. I in fact listened to two recordings, although one of them in its entirety.
4. I first attempted to listen to the recording at normal speed via a speaker connected to the Claimant's representative's laptop but that proved virtually unintelligible. I then listened to a slowed down version of the recording which had been prepared by the audio-video expert. Whilst that recording could not be described as perfect, it was certainly more intelligible than the one played at normal speed. I was mindful however that, from the perspective of the Claimant and her reaction to the recording which formed the basis of her resignation and consequently her claim, it was only the initial recording, and the transcription that she herself made of that recording, which were relevant.

ISSUES AND LAW

5. Both parties had separately prepared draft lists of issues and both broadly reflected the issues that I had myself identified in advance of the hearing, with the only particular difference between the two being that the Respondent's draft list focused more on the recent guidance of the Court of Appeal in Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978. Having considered the two draft lists, I ultimately focused on the issues that I had myself identified, which focused on the test set out in the long-established case of Western Excavating (ECC) Ltd v Sharp [1978] ICR 221. That has now been applied in constructive unfair dismissal cases for some 40 years but remains an appropriate assessment of the issues that are to be addressed. In relation to this case, those were:-
 - 4.1 Did the Respondent commit a fundamental breach of the Claimant's contract of employment? In this case, the breach asserted related to the implied term of mutual trust and confidence arising from the content of a conversation between two of the Respondent's employees which was recorded by the Claimant.
 - 4.2 If so, did the Claimant resign in response to that breach and not for any other reason?
 - 4.3 If so, did the Claimant in any way affirm the breach, whether by her conduct or due to the length of time between the event giving rise to the alleged breach and her resignation?
6. If I decided in the Claimant's favour in relation to her claim, I would then need to consider the matter of remedy. At the outset of the hearing, it was identified that completing the evidence and submissions in the one day allocated would be difficult and therefore it was decided that the calculation

of any remedy would be left for another hearing, if required. I indicated however that I would want to address, if relevant, in my judgment any issue of principle regarding the calculation of remedy in relation to matters such as whether any compensation should be reduced for contributory conduct, or by reference to the application of the decision in Polkey v A E Dayton Services Limited [1988] ICR 142, and whether any award should be adjusted, in either direction, by virtue of alleged failures, by both parties, to comply with the terms of the ACAS Code of Conduct.

FINDINGS

7. There was not a great deal of dispute between the parties in relation to much of the evidence that was put before me. I set out below my findings in relation to the matters relevant for my deliberations, and where I have preferred one version of events to another I have done so on the balance of probabilities.
8. The Respondent provides freight delivery, warehousing and import/export services in the United Kingdom and internationally. It employs 23 people on a single site. The company is owned by two individuals, Mr Smallbone and Mr Steve Foster, and Mr Smallbone and Mr Foster are the Respondent's directors. Mrs Turner was also a director of the Respondent up to 2008 but had ceased to act as director at that time. She nevertheless remained a director of an associated company of the Respondent, Axis Global Freight Ltd. Mrs Turner was in charge of the administrative side of the business, in terms of matters such as customer services, and was accepted by Mr Smallbone as being one of the "top four" of the Respondent's management, the other two being Mr Smallbone himself and Mr Foster and another employee, Mark Brown, who I took to be in charge of the operational side of the business. In terms of the customer services department, Mrs Turner worked with the Claimant and another employee, Anne Jeffries, but I was satisfied that Mrs Turner was more senior to both the Claimant and Mrs Jeffries and effectively managed the two of them.
9. The Claimant had worked for the Respondent since April 2006, initially as a credit controller, but then in a customer service role. The Claimant had been a longstanding friend of Mr Smallbone's wife which had contributed to her appointment. That friendship continued until the events of September 2017 which led to the termination of the Claimant's employment. During her employment, the Claimant also became a close friend of Mrs Turner and the two went together on a trip to New York in September 2017.
10. The Claimant gave evidence that an incident of concern initially occurred in February 2017, when she became aware of discussions between Mrs Turner and Ms Jeffries, which she described as "a little cattiness", and in which dissatisfaction was expressed by those two about the way she was performing her duties. Her evidence was that she told Mrs Turner about her concerns at the time and that Mrs Turner had denied to her that any such discussion had taken place with Ms Jeffries. In her evidence, Mrs Turner denied having any such conversation with the Claimant. However,

I preferred the Claimant's evidence on the point on the basis of the fact that she had taken the step of recording the conversation between Mrs Turner and Ms Jefferies in September 2017, which I considered pointed to the fact that she must have had pre-existing concerns about the exchanges between them.

11. Mrs Turner confirmed in her evidence that she was indeed concerned about the Claimant's performance and did not feel that she was pulling her weight. She also confirmed that she had discussions about that with Ms Jeffries. There was no evidence before me to confirm whether or not any such concerns about the Claimant's performance were justified but I did conclude that Mrs Turner did genuinely hold them.
12. In addition to her duties for the Respondent, the Claimant also carried on a business dealing with balloon arrangements. The Respondent was aware of that and had not objected to it, although it did not seem that the balloon business was a particularly large one. It did nevertheless form part of the background to the issues which led to the Claimant's resignation, in that, on 14 September 2017, the Claimant had a conversation with Mr Smallbone within the office during which he asked her to make balloon arrangements for his wife's 50th birthday party in November, which was due to take place on a Friday night.
13. A discussion took place about the arrangements for that event and it became apparent that, in order to prepare matters for the party, the Claimant would need to spend time at Mr Smallbone's home on the Friday. The Claimant indicated to Mr Smallbone that she was happy to make the arrangements but had no annual leave to take to prepare for the party, asking Mr Smallbone if he did not mind her taking half a day unpaid. Mr Smallbone then indicated that the Claimant could, in fact, take the half day as a paid holiday as it was being done to help him.
14. Ms Jeffries was present when this discussion was taking place and, although I did not hear evidence from her directly, it seemed that she did not hear the Claimant indicating to Mr Smallbone that she would take the day as unpaid leave and only heard the discussions about her taking the half day as paid leave. It appears that Ms Jeffries was annoyed by what she perceived as favourable treatment of the Claimant by Mr Smallbone and that she then spoke to Mrs Turner about what she had overheard, i.e. that Mr Smallbone had granted the Claimant a half day's paid leave to work on the balloon arrangements at his home and not the earlier part of the conversation in which the Claimant had indicated that she would take the half day off on an unpaid basis.
15. Mrs Turner then spoke to Mr Smallbone later that day, initially by telephone and then in a face-to-face conversation outside the office in the car park, and expressed her dissatisfaction at what had occurred. The evidence over the content of that conversation was very similar between Mr Smallbone and Mrs Turner, and was that Mr Smallbone explained that the Claimant had initially offered to take the time off as unpaid but that, as the Claimant was doing the work for Mr Smallbone personally, he did not

think it was appropriate for her to do that. The conversation did however move on to address Mrs Turner's concerns about the Claimant's work and that she was not working as hard as Ms Jeffries. The discussion also included the possibility that Mrs Turner might be moved into a role in the sales team. It appeared to have been left between Mr Smallbone and Mrs Turner that matters would be left as they were for the time being but would be discussed further in January 2018.

16. On the following day, Friday 15 September 2017, the three individuals in the customer services team were in work as usual. The Claimant and Mrs Turner were present to start with, with Ms Jeffries arriving at around 9.30am. Upon Ms Jeffries' arrival, the Claimant absented herself but left her mobile phone behind to record the conversation that she anticipated would be undertaken between Mrs Turner and Ms Jeffries and in which she anticipated that the discussion would be about her, bearing in mind that the Claimant had observed Ms Jeffries paying close attention to her discussion with Mr Smallbone the day before. The recording was done covertly with a view to the Claimant having some evidence that Mrs Turner and Ms Jeffries were discussing her "behind her back". The Claimant then played back the recording to herself that evening and heard more than she had anticipated.
17. Whilst the Respondent took issue with some of the transcription of the conversation, there was in fact very little of substance that was disputed. In the conversation, Mrs Turner referred critically on several occasions to the Claimant's work and did so in clearly disparaging terms. Of most relevance to the Claimant's claims however, were sections of the conversation in which Mrs Turner reported that her discussion with Mr Smallbone had encompassed plans to remove the Claimant and replace her with another employee.
18. These included the following:

"Gary said can you put up with her until January and we'll get rid of her";

"He said we are going to have to think about what we are going to do with her. We'll say: "There's not a job there" and make her redundant";

"I will have to make a more better case for it in the end. I said she gets paid a fair wage for doing not a fucking lot, I said and that's the problem. It annoys me as well. It's not just Ann, it's painful";

"Anyway, we might have to move her to sales"; and

"We will get somebody else in here, like a youngster, who we can train and manipulate who won't get paid a shedload of money, that's what I am thinking anyway".
19. Of those comments, only the reference to redundancy in the second quotation was disputed, with the Respondent contending that the tape did not record *"We'll say: "there's not a job there" and make her redundant"*

but said, "*Because if there's not a job there, we'll make her redundant*". In the event, the recording was of such poor quality at that juncture that I could not form a view one way or the other on that. The Respondent did not, however, take issue with the accuracy of any other of the extracts from the recording.

20. With regard to the reference to redundancy however, both Mr Smallbone and Mrs Turner confirmed that the team was busy such that I did not see that any redundancy situation would have arisen.
21. The position of both Mrs Turner and Mr Smallbone was that the recorded comments did not accurately reflect the content of the conversation they had had the day before, which I accepted was the case. I also accepted Mrs Turner's evidence that she was elaborating her conversation with Mr Smallbone for Ms Jeffries' benefit. She stated that this was through a desire on her part to improve the working relationship in the office, although it is difficult to discern how that could have been achieved by her actions. I suspected that the embellishment of the conversation was done more through Mrs Turner's desire to placate Ms Jeffries in the short term, although nothing turns on her motive.
22. However, regardless of whether the conversation accurately reported Mr Smallbone's comments or not, the Claimant heard reported comments, which appeared to involve Mr Smallbone, that the Respondent would be looking to dismiss the Claimant, possibly by way of some created redundancy situation, and then to replace her with a younger and cheaper replacement. The Claimant described this as being shocking and devastating and that she felt like she had been "hit by a bus". I could understand that she would have perceived the comments made in the conversation as being particularly hurtful and damaging, coming from her manager, and someone whom she understood to be a very close friend, and also involving a director and owner of the company.
23. The Claimant did not however resign immediately following that conversation. Her evidence, which I accepted, was that she was so devastated that she "bottled everything up inside" and did not even speak to her husband about it at that stage. There was also documentary evidence however of text or "WhatsApp" contact between the Claimant and Mrs Turner over subsequent days which appeared normal. There was also contact between the Claimant and Mr Smallbone the following week about his purchase of a present for his wife's birthday. There was no indication in any of those dialogues of any concern on the part of the Claimant about what had happened.
24. The following week, Ms Jeffries was absent due to holiday with only the Claimant and Mrs Turner, and on occasions two other employees, being present in the office. It was only following Ms Jeffries' return to work on Monday 25 September 2017 that matters appeared to come to a head in the Claimant's mind.

25. The Claimant's evidence, which was largely accepted by Mrs Turner, was that she did not appear well on Monday 25 September and Tuesday 26 September, with Mrs Turner asking the Claimant if she was well because she looked tired and with the Claimant responding that she had not been sleeping. Over the two days however, the Claimant's evidence was that she found it particularly difficult with Ms Jeffries being back in the workplace and she ultimately told her husband what had happened at work on the evening of the 26th. They discussed the situation and the Claimant then concluded that she would resign and she provided that resignation in a letter to Mrs Turner in a letter at the end of the following day, Wednesday 27 September.
26. After the Claimant submitted her resignation, there were attempts by Mrs Turner to contact the Claimant to discuss the reason for leaving, which included a visit by Mrs Turner to the Claimant's home where an argument ensued. At that meeting the Claimant confirmed to Mrs Turner that she had recorded the conversation and she read out the relevant parts of her transcript to her.
27. Mrs Turner wrote to the Claimant the following day, 28 September 2017, noting that the Respondent was sad to receive the letter and felt that they needed to respond and wanted to put right the impression that the Respondent had been looking to end her employment. The Respondent then sent a further, rather more formal, letter on 6 October 2017, having taken advice from its HR advisers, in which it was recorded that the Claimant's letter of resignation had been lodged as a formal grievance and in which the Claimant was invited to a grievance meeting on Friday, 13 October 2017, with Mr Foster. That meeting took place, although it appeared to be rather brief and did not lead to any conclusion.
28. In the meeting, the Claimant stated that she felt that the Respondent's actions amounted to constructive dismissal and that the relationship of trust and confidence with the Respondent had been destroyed. In answer to a question from the HR adviser, who was present at the meeting, as to how the Claimant would like to resolve the matter, the Claimant replied that it was down to the adviser to discuss the matter with Mrs Turner and revert back to her. She confirmed however that she did not want to be reinstated. There was no further contact between the parties at the time.
29. The only other point of importance to note, although not related to the specific facts of the case, was Mr Smallbone's observations in his evidence that he would not have acted on his discussion with Mrs Turner and dismissed the Claimant due to any performance concerns, and nor would he have dismissed the Claimant had he looked at her covert recording as a disciplinary issue. He indicated that, due to the relationship between the Claimant and his wife, it would take something extremely serious for him to take the step of dismissing the Claimant.

CONCLUSIONS

30. Applying my findings to the issues identified above, I concluded as follows.

31. With regard to the question of whether the Respondent had fundamentally breached the Claimant's contract, I concluded that the comments made, notwithstanding that they were inaccurate and embellished, nevertheless did amount to a fundamental breach.
32. The Respondent's representative submitted that the circumstances in which the Claimant became aware of the conversation between Mrs Turner and Ms Jeffries, i.e. via a covert recording, meant that it could not be concluded that that private discussion would satisfy the test, set out by Lord Steyn in Malik v BCCI [1997] UKHR 23, of whether the conduct was "*calculated or likely to destroy or seriously damage the relationship of trust and confidence*". Those representations focused on the lack of intention of Mrs Turner or Ms Jeffries to breach the implied term of trust and confidence on the basis that they would not have expected the Claimant to have heard the conversation at all. However, I was not satisfied that it was appropriate to consider matters in that way.
33. The actual words used by Lord Steyn were "*calculated or likely to destroy or seriously damage*". Whilst it could not be said that the content of the conversation was "*calculated*" to destroy the relationship, as neither Mrs Turner nor Ms Jeffries anticipated that the Claimant would be aware of their conversation, I considered that, viewed objectively, the overhearing of the conversation, which might not only have arisen through a recording but simply through the Claimant accidentally overhearing the conversation, was nevertheless "*likely*" to destroy or seriously damage the relationship of trust and confidence.
34. With regard to the issue of whether the Claimant resigned in response to the Respondent's breach, no evidence was put before me of any other factor which might have prevailed upon the Claimant and I was therefore satisfied that she had indeed resigned in response to the breach.
35. Turning to the issue of affirmation, the Respondent contended that, either the Claimant's actions in maintaining cordial relations with Mrs Turner and Mr Smallbone after 15 September, or simply the fact of her delaying for a period of some 12 days before resigning, meant that she had affirmed any breach that might have arisen. I was conscious of the guidance provided by the EAT in the case of Chindove v William Morrison Supermarket PLC (UKEAT/0201/13), that the matter is not one of time in isolation, and the principle is whether the employee has demonstrated that they have made the choice to affirm the contract. The Court in that case noted that there was no automatic time which, if passed, would amount to affirmation, and repeated the observations of the Court of Appeal in Buckland v Bournemouth University High Education Corporation [2010] 4 All ER 196, that a decision to resign is for many employees a serious matter which will need them to consider the economic consequences of their actions.
36. The Respondent contended that the fact that the Claimant stayed in work for some eight working days before resigning, together with her text or WhatsApp contact with Mrs Turner and Mr Smallbone in the intervening

period, meant that she could not have considered the comments she heard in the recording hurtful or damaging, or, alternatively, that she had simply delayed too long in resigning such that she should be considered to have affirmed any breach of contract which might have arisen. The Claimant contended that she had been taken aback by the comments she had overheard and needed time to make sense of them and to take stock. Her continued contact with Mrs Turner and Mr Smallbone was therefore simply her "keeping a brave face on things" (my phrase) in the meantime. She also contended that it was easier for her to cope with matters when Ms Jeffries was away from the office but that matters came to a head on Ms Jeffries' return.

37. Overall, I was satisfied that the Claimant's contact with Mrs Turner and Mr Smallbone did not mean that she did not perceive the comments as hurtful and damaging. I considered her behaviour was consistent with someone coming to terms with an issue which had caused her significant concern and with someone then making a decision on what her actions should be. In particular, I noted that Ms Jeffries was not there for the week following the recording which I considered would have eased the atmosphere at work and I can understand how Ms Jeffries' return could have crystallised the Claimant's thoughts. I did not consider that the Claimant's actions in the intervening period led me to conclude that she had accepted the conduct and waived any breach.
38. I also did not consider that the Claimant's delay of twelve days, or eight working days, before submitting her resignation amounted to a waiver of the breach due to delay. In line with the guidance provided by the Court of Appeal in Buckland, I saw nothing wrong with the Claimant taking a little time to collect her thoughts before resigning.
39. Having considered that the Western Excavating test had been made out, I then concluded that that dismissal was unfair. I did not consider that the Respondent had made out a potentially fair reason for the constructive dismissal, whether in terms of the Claimant's capability, i.e. by reference to any underlying concerns about her performance, or by reference to her conduct in terms of covertly recording the conversation. However, even if I had been satisfied that a potentially fair reason had been made out, I did not consider that the Respondent would have acted reasonably if it had dismissed the Claimant for that reason.
40. As I have already noted, the Respondent had not, at any stage and in any way, raised the issues of concern over her performance with the Claimant, which would be a prerequisite for a fair dismissal on grounds of capability. Similarly, with regard to any dismissal by reason of the Claimant's conduct, Mr Smallbone's evidence was very clear that he would not have looked to dismiss her for that reason or, due to her relationship with his wife, for any reason other than a most severe one.

REMEDY POINTS

41. Notwithstanding that the Respondent's representative did not raise any Polkey issue, I nevertheless thought it appropriate to consider whether any such deduction should be made, although I ultimately considered that it should not. As I have noted, whilst the Respondent's witnesses indicated that there were some concerns over performance, none had been raised with her, whether formally or informally. I also noted Mr Smallbone's evidence that, due to the Claimant's friendship with his wife, he would not dismiss other than in the most extreme of circumstances. I did not see therefore that, even if the Respondent had taken disciplinary action against the Claimant with regard to her covert recording of a conversation between her colleagues, it would not have involved her dismissal.
42. The Respondent's representative also did not make any particular representations with regard to contributory conduct but, for the same reasons as I have identified above in relation to Polkey, I did not consider that there should be any deduction to be made from the Claimant's compensation to reflect any contributory conduct. As I have noted, Mr Smallbone confirmed in his evidence that he would not have dismissed the Claimant for the covert recording and, regardless of that, it was not a factor in her dismissal.
43. With regard to the issue of any uplift or reduction of compensation to reflect failures to comply with the ACAS Code, I noted that the Claimant was asserting that the Respondent had failed to comply with the terms of the ACAS Code by failing to hold a disciplinary hearing and appeal and also that the Respondent was arguing that the Claimant herself had failed to comply with the terms of the ACAS Code by failing to appeal following the grievance meeting. However, I did not consider that there was any breach of the ACAS Code by either party.
44. On the Respondent's side, the Claimant resigned in response to what she perceived to be the Respondent's breach of contract and the Respondent therefore did not operate any disciplinary procedure. On the Claimant's side, although the Respondent treated the Claimant's resignation letter as a grievance and a meeting was held with her, I was not satisfied that that was part of any formal grievance process. The Claimant's letter was a straightforward letter of resignation which did not lead to the application of any grievance process. Furthermore, no outcome of that meeting was ever provided to the Claimant such that, even if there had been a formal process underway, she could not be criticised for not pursuing any form of appeal.
45. In conclusion in relation to the Claimant's compensatory award therefore, the only issue to be taken into account will be the Claimant's attempts to mitigate her loss. The issue of the sum to be awarded to the Claimant will be dealt with at a Remedy Hearing which will be scheduled.

Employment Judge S Jenkins

Date: 09.09.18.....

Sent to the parties on: .19.09.18.....

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For the Tribunals Office