



EMPLOYMENT TRIBUNALS

Claimants: Mr S Ward (1) and Mr B Sullivan (2)

Respondent: Ann's Cottage Warehouse Ltd

Heard at: Bodmin **On: Thursday 24 and Friday
25 October 2019**

Before: Employment Judge Matthews

Representation:

Claimants: In Person

Respondent: Mr S Hoyle – Consultant (Croner)

RESERVED JUDGMENT

1. Mr Ward was unfairly constructively dismissed by the Respondent Company.
2. The Company is ordered to pay to Mr Ward unfair dismissal compensation totalling £3,648.89, comprising a basic award of £2,730.50 and a compensatory award of £918.39.
3. Mr Sullivan was unfairly constructively dismissed by the Respondent Company.
4. The Company is ordered to pay to Mr Sullivan unfair dismissal compensation totalling £1,567.81, comprising a basic award of £1,135.81 and a compensatory award of £432.00.
5. The Recoupment Regulations do not apply to either award.

REASONS

INTRODUCTION

1. On 3 April 2019 Employment Judge Harper ordered that Mr Stephen Ward's and Mr Bruce Sullivan's (the "Claimants") claims be heard together as they appeared to give rise to common or similar issues of fact and law. As far as facts are concerned, it transpires that this is nearly, but not quite, the case. As is usual in such circumstances, there are a few differences. The claims and the issues involved were clarified and agreed at a Case Management Preliminary Hearing by telephone before Employment Judge Midgley on 26 June 2019.
2. The Claimants' common case is that they were unfairly constructively dismissed. The Claimants say that conduct of the Company amounted to a fundamental breach of the implied term of trust and confidence in their respective employment contracts entitling them to resign and treat themselves as unfairly constructively dismissed. The alleged conduct relied on can be summarised as the Company's subjecting them to a flawed disciplinary process resulting in an unfair final written warning for each of them. Details of the alleged conduct are set out in Employment Judge Midgley's Orders and can be seen at 53-54 in the bundle (all references are to pages in the bundle, unless otherwise specified).
3. The Company defends the claims. A point is taken that the reason the Claimants resigned was to go to new jobs. If that is not the case, the Company says that there was no fundamental breach of contract and if there was, the Claimants delayed too long before resigning and thereby affirmed the contract. The Company also says that, if there was a dismissal, it was fair for a conduct reason. If unfair, the Company raises arguments of contribution.
4. The Claimants each gave evidence supported by a written statement. On behalf of the Company the Tribunal heard from Mr Robert Harris (Managing Director) and Miss Kate Westwood (a Consultant with Croner, who heard the appeals). Each produced a written statement. A statement of Ms Amy Dutton (Operations Director) was also produced on the Company's behalf. Ms Dutton did not attend the Hearing and her statement was unsigned. Accordingly, the Tribunal read the statement but has given no weight to opinions expressed in it. The statement clearly follows the evolution of some of the events evidenced in the bundle and is useful in that respect.
5. There was an agreed bundle of documentation. This was supplemented by Mr Hoyle producing copies of four pages generated on the internet by Mr Sullivan between 10 August and 30 December 2018.
6. The Hearing was listed for two days. In the event, evidence and summaries took one and a half days. Rather than using the remaining time allowance to consider and give Judgment, the Tribunal reserved judgment to better consider, in particular, the evidence.

7. In deciding this case, it is not necessary for the Tribunal to make findings in relation to every disputed fact. Where it is necessary, the Tribunal's findings are on the balance of probability taking account of the evidence as a whole.

FACTS

8. The Company's business is described by Miss Westwood as being that of Cornwall's original family run surf and lifestyle store. Mr Harris mentioned that it currently employs around 200 local people in warehouse, retail (around 14 stores in Cornwall) and support operations.
9. Mr Ward started work for the Company on 16 December 2002. At the time Mr Ward left the Company, he was a Warehouse Manager managing a team of people in the Company's Warehouse not far from Wadebridge on the North coast of Cornwall. Mr Ward left the Company's employment on 14 December 2018.
10. Mr Sullivan started work for the Company on 29 April 2009. Mr Sullivan's job was that of Assistant Manager (Warehouse). Mr Sullivan reported to Mr Ward. Mr Sullivan was the "second in command" in the warehouse. Mr Sullivan left the Company on 15 December 2018.
11. It is common ground that one of the Company's male employees (referred to in this Judgment as "Ms X" and who worked in the buying department) had, for some time prior to the autumn of 2018, been attending work wearing items of women's clothing and make-up. Around the time of the events we are dealing with, Ms X was, the Tribunal understands, considering a gender re-assignment and these events prompted her to "come out" on the subject as a whole. As a result, she is now known as Ms X.
12. Again, prior to the autumn of 2018, Ms X posted on a "swingers" website. The Tribunal understands this to be a website on which couples seek to add sexual partners to their twosomes. Although it seems that one has to "sign up" to the website, there are no other restrictions to viewing it. It is, to all intents and purposes, a public website. The posts included photographs. Although these were not produced to the Tribunal or, indeed, viewed by those on the Company's side involved in subsequent investigatory, disciplinary and appeal processes, they are described as "explicit".
13. In the period immediately leading up to 19 September 2018, Ms X's website posts were discovered by Mr Mark Rudge, an employee of the Company. At work, during a lunch break on Tuesday 18 September, Mr Rudge had told Mr Sullivan and Ms Kirsty Carter (Warehouse Supervisor) about this. It seems that this may then have become the subject of gossip in the workplace.
14. The next day, Wednesday 19 September 2018, there was an evening social gathering for drinks at the Swan Hotel in Wadebridge followed by a meal at the Dancing Tai Pan. The gathering was primarily for staff working in the Company's warehouse, although office and other staff attended as well.

Some nineteen people attended. Ms X was not present. The occasion was subsidised by the Company to the tune of £20 a head.

15. During the drinks' session at the Swan Hotel, the subject of Ms X came up. Using his mobile phone, Mr David Ede (Warehouse Assistant) accessed Ms X's website posts on the swingers' website.
16. Once everyone had sat down for the meal at the Dancing Thai Pan, Mr Ede accessed Ms X's posts on the swingers' website again. At some stage, Mr Ward made a swinging motion with his arms to indicate what Mr Ede was viewing on his phone to people a little further away.
17. Mr Ede's phone was passed around twelve of the nineteen people present. Those twelve were Mr Sullivan, Mr Ward, Ms Rachael Ferrar (Marketing Assistant), Ms Jodi Mitchell (Office Assistant), Ms Laura Perry (Marketing Co-ordinator), Mr Andrew Nuttall (consultant buyer and manager in the buying department and a director of Ann's Cottage (Wadebridge) Ltd, a company in the Company's group of companies), Ms Carter, Ms Sarah Jepson (Warehouse Assistant), Mr Simon Powdrill (Warehouse Assistant), Mr Stephen Harry (Warehouse Assistant) and Ms Gemma Erasmus (Warehouse Assistant). Of these, three (Messrs Sullivan, Ward and Ede) subsequently received final written warnings in relation to the event. (It seems that Mr Rudge was also disciplined).
18. Mr Ward says that he was passed the phone by Mr Ede. After viewing a couple of photos, Mr Ward passed the phone to Mr Sullivan. Mr Sullivan says that he took the phone briefly, looked at two photos (neither of which, he says, were explicit) and passed the phone on to Ms Mitchell.
19. The next day, Thursday 20 September, Ms Perry went to see Ms Dutton to complain about the events of the previous evening.
20. Having been alerted by Ms Perry, Ms Dutton spoke to Ms Taylor. The *"Investigatory Meeting"* note is at 86. Ms Taylor reported *"whispering and giggling and there was a phone involved"*. Ms Taylor had *"clocked"* an *"inappropriate comment"*. The main instigators were Messrs Sullivan, Ward, Ede and Mr Stephen Wilcox (Senior Supervisor). Ms Taylor *"felt like it was bullying"* was *"disgusted"* and *"wanted to leave as was on the verge of tears."*
21. Ms Dutton then had a more formal discussion with Ms Perry. A note of that discussion headed *"Investigatory Meeting"* is at 85. Ms Perry reported that *"people from the warehouse side were passing around a phone with pictures of"* Ms X on it. Ms Perry, who had caught sight of the phone, opined that the pictures were *"graphic"*. Ms Perry reported that she had said they should stop what they were doing but was told by Mr Wilcox to *"come on Laura"*. Ms Perry reported that she was *"disgusted by what had happened, felt awkward"* and it was *"a form of bullying and was wrong"*. Ms Perry reported that Ms Taylor had been upset, started to cry and would have left if she could have done so. Ms Perry said that those involved were Messrs

Sullivan, Ede, Ward and Wilcox and, possibly, Ms Erasmus. The others were *“just laughing at the situation”*.

22. Ms Dutton enlisted the help of Ms April Wakeling (Retail Director) who interviewed Ms Mitchell and Ms Caroline Joy (83 and 84). Ms Mitchell described what had happened as *“inappropriate”*. Ms Joy thought it *“mean and out of order”*.
23. Around 1400 on that 20 September, Ms Dutton, accompanied by Ms Wakeling, interviewed Mr Ward. The note is at 80. Mr Ward described how Mr Ede’s phone had been passed around. Both Ms Dutton and Ms Wakeling stressed how serious the situation was.
24. Ms Dutton and Ms Wakeling also interviewed Mr Sullivan. The note is at 81. Mr Sullivan also described how the phone had been passed around. Mr Sullivan accepted that what had happened could have been *“inappropriate”*, but pointed out that a director (Mr Nuttall) had been there, it had been a social occasion and Ms X had made publicly available posts.
25. The Tribunal notes that there are differences between the various accounts of what happened at the social gathering on 19 September 2018. These were a particular preoccupation of the Claimants during the disciplinary process and this Hearing. Although this is understandable, the differences do not have much relevance to the determination of these proceedings and the Tribunal makes no findings on them.
26. The Tribunal notes that it appears that Ms X, herself, never made a complaint about the incident. In oral evidence from Mr Ward and Mr Harris it seems that Ms X was spoken to on the subject. Mr Harris’s account was third hand. Apparently, Ms Dutton (from the papers it seems it may have been Ms Wakeling) spoke to Ms X who had explained that it had been *“the best day and the worst day of her life”* when she had heard about what happened. It had prompted her to *“come out”* on the subject of her gender. Mr Ward reports having a similar conversation after his disciplinary process had been completed (also, see Mr Ward’s conversation with Ms Westwood during the appeal - p129). However, Mr Ward added that Ms X had told him, in terms, that she thought the Company had overreacted.
27. Matters moved quickly. On Friday 21 September 2018 Mr Ward and Mr Sullivan each received a letter from Ms Dutton, requiring them to attend disciplinary hearings (88-89, 90-91). The letters were identical, apart from the details of the addressees. The allegation was *“Looking at sensitive and possibly explicit pictures relating to another member of staff while at a works dinner”*. Each received a copy of the note of their respective interviews with Ms Dutton and Ms Wakeling. Prior to their respective disciplinary hearings, they were also given copies of the notes of the interviews with Ms Perry and Ms Taylor. At this stage, however, Mr Ward and Mr Sullivan were not provided with copies of the notes of the interviews with Ms Mitchell, Ms Joy or each other.

28. On Monday 24 September 2018 Ms Dutton and Ms Wakeling interviewed Mr Wilcox. The note is at 93. Neither Mr Ward nor Mr Sullivan saw the note before their respective disciplinary hearings. That same day, Mr Ward had made a note of Mr Wilcox's answers to some questions Mr Ward had put to Mr Wilcox (92).
29. Mr Ward's disciplinary hearing took place on Tuesday 25 September 2018. The note is at 94-97. The meeting was taken by Mr Harris, Ms Emma Pritchard took the note and Mr Ward was accompanied by Mr Alistair Stratton (Web/Warehouse Assistant). In terms, Mr Harris put it to Mr Ward that, as a manager, he should have put a stop to what had happened in the phone passing incident. Mr Ward did not initially agree. Eventually, probably hoping that it might improve the outcome, Mr Ward was persuaded to agree that he would have put a stop to it if he had the chance over again, it was a stupid thing to have done and he would not let it happen again. Mr Harris concluded the meeting saying *"We will now review the points and information and come back to you with a decision."*
30. Mr Sullivan's disciplinary hearing also took place on 25 September. Ms Pritchard's note is at 98-99. Mr Harris took the meeting. The note can be referred to for its full content. Broadly, the points covered were not dissimilar to those covered in Mr Ward's disciplinary hearing. Under some pressure and probably, like Mr Ward, hoping to improve the outcome, Mr Sullivan allowed *"I appreciate the severity of it all" and "I regret it and it won't happen again."*
31. At this point, the Company (advised by Croner – see 108 – Mr Harris's comment, also Mr Harris WS7) realised it had made some procedural errors in the way it had conducted the disciplinary processes to date. It now moved to remedy this.
32. There had been no indication by Mr Harris at either disciplinary hearing that Mr Harris would do anything other than make a decision. However, on Wednesday 27 September 2018 Mr Harris wrote to Mr Ward and to Mr Sullivan reconvening the disciplinary hearings (104 and 105). The allegation had changed to *"You were looking at sensitive and explicit pictures on a phone which had been logged onto a website relating to another member of staff while at a work dinner on 19th September 2018. Your actions caused offence to other members of staff."* The statements of Ms Mitchell, Ms Joy and Mr Wilcox were now enclosed. In the meantime, Mr Ward had handed in his record of Mr Wilcox's answers to the questions Mr Ward had put to him on 24 September.
33. Messrs Ward, Sullivan, Rudge and Ede then lodged a joint grievance with the Company relating to the disciplinary procedures in train against each of them (106).
34. Mr Ward's reconvened disciplinary hearing took place on Monday 1 October 2018. Ms Pritchard's note is at 107-110. It was agreed that all the grievance points related to the disciplinary process and would, therefore, be dealt with

as part of it. Time was taken up doing that. Otherwise Mr Ward continued to challenge the evidence.

35. Mr Sullivan's reconvened disciplinary hearing also took place on 1 October. Ms Pritchard's note is at 111-112. The ground covered was similar to that covered in Mr Ward's reconvened disciplinary hearing.
36. Later the same day Mr Harris called Mr Ward in and gave him a final written warning. Mr Ward was also required to attend equal opportunities/diversity and line managers' courses. There is a note of the meeting at 114. The allegation (see paragraph 32 above) was found to be substantiated. Mr Harris expanded on this in his oral evidence. Mr Harris relied on the pictures being "*sensitive and explicit*" despite his never having seen them. When asked about this, Mr Harris made the fair point that this had never been challenged by Mr Ward or Mr Sullivan. The "*offence*" caused to other members of staff was that reported by Ms Perry, Ms Taylor, Ms Mitchell and Ms Joy. In the notes it is recorded that Mr Harris added: "*This was inappropriate behaviour, I hope you have learnt from this and do not repeat anything like this again, this was serious misconduct.*"
37. On Tuesday 2 October Mr Harris called Mr Sullivan in and imposed the same sanction as had been imposed on Mr Ward. The note is at 115. It is mostly identical to the note of the meeting with Mr Ward.
38. The same day, 2 October 2018 Mr Harris wrote to Mr Ward and to Mr Sullivan in identical terms to confirm the position (116, 117-118). The letters were explicit about what the final written warnings meant. They can be referred to for their full content.
39. No doubt Mr Harris hoped that would be the end of the matter. Staff members had reported being upset at a works social event, there were the possible makings of discrimination in the background, Mr Harris had taken action and that was that. If that was Mr Harris's hope, it was to be confounded.
40. Diverging from the disciplinary processes being conducted with the Claimants for a moment, the Tribunal notes the document at 87 in the bundle. It is a note of a meeting Mr Harris had with Mr Nuttall. It will be remembered that Mr Nuttall had been present at the social event on 19 September 2018 and was amongst the group passing the phone around. It will also be remembered that Mr Nuttall was a consultant to the Company and a director of a company in the Company's group. The note is undated but, on its face, we know that the meeting it records took place after the Claimants had been disciplined. We also know from mention in the later appeal process conducted by Ms Westwood, that the meeting took place before the appeals were heard. The timing of the meeting with Mr Nuttall is surprising and unsettling. It would surely have been an obvious step for the Company to have interviewed arguably the most senior manager present at the social gathering on 19 September 2018 to obtain his version of events. Mr Harris is noted as putting it to Mr Nuttall that he should have put a stop to the passing of the phone on 19 September. Mr Nuttall acknowledges that he

should have done so. Mr Harris's final say was "*The finer point is we cannot condone it, you are a director of a company, if it ever happened again we need your support to stop it. This will be put in the file as a record we have spoken and we cannot condone this.*" On the face of it this stops short of an explicit personal rebuke, although the reference to placing the note on file could be seen as getting there.

41. On 4 October 2018 Mr Ward appealed against Mr Harris's decision. Mr Ward's letter of appeal is at 119. Broadly, there were three grounds. First, the sanction was too severe. Second, the procedures followed "*did not follow the ACAS code of practice.*" Third, the conclusion reached was not justified by the evidence.
42. On 9 October Mr Sullivan appealed. Mr Sullivan's letter is at 122. It contained a single ground of appeal. In essence, Mr Sullivan's ground of appeal was that it was unfair that he had been treated differently from others involved in the incident at the social gathering on 19 September.
43. Ms Westwood was appointed to conduct the appeal hearings. As Ms Westwood clearly understood, it was not her job to rehear the cases, although Mr Ward's appeal, in particular, was wide ranging.
44. Mr Ward's appeal hearing took place on 29 October 2018. Mr Ward was again accompanied by Mr Stratton and Ms Pritchard took the note (125-130). Ms Westwood focussed on the points of appeal. When asked, Mr Ward offered that a warning would have been acceptable.
45. Ms Westwood heard Mr Sullivan's appeal on 30 October. Mr Westwood was accompanied by Mr Wilcox and Ms Pritchard took the note (131-139).
46. On 6 November 2018 Mr Ward and Mr Sullivan each received a letter from Mr Harris effectively upholding the final written warnings (151, 152). Mr Harris's letter enclosed Ms Westwood's decisions in the form of a report for each of them (140-144, 145-149).
47. Looking at Ms Westwood's reports, the Tribunal notes that Ms Westwood had seen what the reports record as a "*Statement*" from Mr Nuttall. In fact, this was the note of the meeting Mr Harris had with Mr Nuttall (see paragraph 40 above). Up until and including the time of the appeal outcome, neither Mr Ward nor Mr Sullivan saw that note. That this was the case had been clear to Ms Westwood during the appeal hearings. (Mr Sullivan says that he first saw the note on 6 November 2018, the same day as he received the appeal verdict).
48. Ms Westwood's reports followed a similar format but, as the grounds of appeal had been different, addressed the issues raised individually.
49. Ms Westwood rejected each of the points of Mr Ward's appeal. Particularly noteworthy is that part dealing with the appropriateness of the sanction:

“After listening to your responses I believe the sanction imposed reflects the allegation in question appropriately particularly in your capacity as manager, there is an expectation regardless whether it’s within the workplace or not to maintain a level of conduct and to ensure you are looking out for the best interests of all employee’s at any given time particularly as a well-established and experienced manager of 16 years. You have actively engaged in an incident that directly or indirectly caused offence thus failing to identified that your actions would undoubtedly have an effect. Given the fact that this has been carried out in front of your team suggests that there is an element of acceptance to this sort of behaviour which is not only inappropriate given your role as a manager but could potentially make your role untenable longer term. Furthermore, In the absence of knowing who instigated the incident it’s difficult to understand whether this sanction is deemed as too severe.”

50. As far as Mr Ward’s complaint that Mr Nuttall had been treated differently was concerned Ms Westwood commented:

“I can confirm that as this member of staff is a consultant and does not hold employee status, therefore is not obliged to undergo the disciplinary process in the same way, to that of employees that are contracted under terms of employment albeit after clarifying I can confirm separate action has been taken with this individual.”

51. During the course of the Hearing Ms Westwood confirmed that the “*separate action*” to which she had referred was Mr Harris speaking to Mr Nuttall in the terms of the note of the Meeting between the two (see paragraph 40 above).

52. Ms Westwood also rejected the ground of Mr Sullivan’s appeal. Ms Westwood wrote:

“Despite other members having viewed the phone that evening the reason they have not been imposed the same level of sanction is because as your role an assistant manager you are expected to uphold a level of appropriate conduct and professionalism within the team. Irrespective of whether you are on work time or not. You undeniably placed yourself in a position whereby the team could lose respect and confidence in you as assistant manger which could potentially raise concerns longer term.

I find no reason to substantiate your claim of being treated differently from other employees particularly as three other members of staff have been imposed sanctions in respect of the same allegation.”

53. As far as Mr Nuttall was concerned, Ms Westwood’s report repeated what she had written in Mr Ward’s report, albeit in slightly different language.

54. Mr Ward says that he saw the rejection of his appeal as the “*final straw*”, particularly as Ms Westwood had hinted at his position being untenable. Mr Ward therefore decided to leave. Before he could do so, however, Mr Ward says he needed to find a new job, given his family responsibilities. Mr Ward accepted a new job on 15 November 2018, served notice on the Company on 16 November and left its employment on 14 December. The short letter of resignation is at 153.
55. Mr Sullivan took a similar view. Mr Sullivan accepted a new job on 16 November, served notice on the Company on the same day and left its employment on 15 December 2018. Mr Sullivan’s letter of resignation is at 154.
56. The Tribunal was referred to extracts from the Company’s policies and procedures (65-79). They do not provide any material assistance in deciding the issues in this case.

APPLICABLE LAW

57. Section 94 of the Employment Rights Act 1996 (the “ERA”) provides an employee with a right not to be unfairly dismissed by his employer. For this right to arise there must be a dismissal.
58. Section 95(1) of the ERA, so far as it is relevant, provides:

“95 Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer 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.”

59. The general principles relating to unfair constructive dismissal are well understood. An employee is entitled to treat himself or herself as constructively dismissed if the employer is guilty of conduct 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. The breach may be actual or anticipatory. The employee in these circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle the employee to leave at once. The employee must act promptly in response to the employer’s actions (and not for some other reason, although the employer’s actions need not be the sole cause) or the employee risks waiving the breach and affirming the contract.
60. It is clearly established that there is implied in contracts of employment a term that employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage

the relationship of trust and confidence between employer and employee. Any breach of this implied term is a fundamental breach amounting to repudiation since it necessarily goes to the root of the contract. Where a claim is founded on a breach of this implied term, the tribunal's function is to look at the employer's conduct as a whole and determine, objectively, if it is such that the employee cannot be expected to put up with it.

61. The burden of proving a breach of contract sufficient to support a finding of unfair constructive dismissal is on the claimant.
62. An unfair constructive dismissal is established when an employee resigns following a fundamental or repudiatory breach of contract by an employer, judged objectively and not by reference to the reasonable band of responses test familiar in "ordinary" unfair dismissal cases. While reasonableness on the part of the employer is a measure which can be used in determining whether there has been a fundamental breach of contract, it is not a legal requirement. The fairness of dismissal under section 94 ERA will only be an issue where there has been a conscious dismissal by the employer.
63. Sections 122(2) and 123(6) of the ERA respectively provide:

"122 Basic award: reductions"...."(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."

"123 Compensatory award"...."(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

64. The Tribunal was referred to British Home Stores Ltd v Burchell [1978] IRLR 379 and Salford Royal NHS Foundation Trust v Roldan [2010] IRLR 721.

CONCLUSIONS

65. Why did Mr Ward and Mr Sullivan resign?
66. The Company's case is that the reason that both Mr Ward and Mr Sullivan resigned was to go to other jobs. On the evidence, that was not the case. Mr Ward and Mr Sullivan resigned because of the sense of injustice they felt at having received final written warnings.
67. Did the acts and omissions complained of, individually or cumulatively, amount to a breach or breaches of the contract of employment by the Company going to the root of the contracts of employment? In other words,

was there a fundamental breach of contract entitling Mr Ward and/or Mr Sullivan to resign and treat themselves, respectively, as constructively dismissed?

68. As already noted, the alleged breaches on which the Claimants rely were set out in Employment Judge Midgley's Orders of 26 June 2019. They can be seen at 53-54 in the bundle.
69. The first nine of these and the last two (4.1.1 - 4.1.9, 4.1.11 and 4.1.12) can loosely be referred to as procedural points or points going to the fairness of the investigatory and disciplinary process. It is long established that a failure by an employer to observe proper disciplinary procedures can amount to a repudiation of the contract of employment. However, on the evidence, there is nothing in these allegations, taken together or cumulatively, which amounts to a fundamental breach of any such implied term of trust and confidence. The Company made procedural errors but put those right. Overall, the Company adopted a reasonable procedure when viewed objectively and the Tribunal cannot identify anything particularly unfair about those aspects of the process.
70. The tenth alleged breach was this:
- “4.1.10 Inconsistent treatment of the employees in relation to the disciplinary incident: in particular,*
- 4.1.10.1 no action was taken in relation to Mr Andrew Nuttall, a director of the respondent, who also scrolled through the images;*
- 4.1.10.2 no action was taken against the individual who had taken or published the explicit photos, despite this being said to be in breach of the social media policy operated by the respondent;”*
71. There is an implied term in employment contracts that an employer will treat the employer's employees fairly. Any breach of the requirement of fairness will go to the implied term of trust and confidence.
72. There are two alleged breaches referred to in paragraph 70. One is that Ms X was not disciplined for posting on a swingers' website (4.1.10.2). This was not, in the Tribunal's view, a fundamental breach of the contracts of employment of either Mr Sullivan or Mr Ward. First, it is not clear that Ms X was in breach of any company policy. Second, even if she were, there is a qualitative difference between Ms X, a potential victim in all of this, and the Claimants who were involved in the perpetration. There is insufficient connection between the position of Ms X on the one hand and the positions of Mr Ward and Mr Sullivan, respectively, on the other, for any meaningful comparison of the treatment of the three of them.
73. The allegation concerning the treatment of Mr Nuttall (4.1.10.1), on the other hand, raises a number of issues. First, on the evidence, Mr Nuttall, arguably the most senior person present at the social gathering on 19 September 2018, was a party (although according to his account, reluctantly) to the

passing of the phone. Second, surprisingly, Mr Nuttall was not interviewed about this until sometime between the Claimants' disciplinary and appeal hearings. Third, when interviewed, Mr Nuttall is recorded as receiving what can, at its highest point from the Company's point of view, be described as an implicit reprimand on file. Fourth, the note of the interview was not seen by Mr Ward or Mr Sullivan until after their appeals had been determined. The Company's explanation for all this is that Mr Nuttall was a consultant and director and could not be subjected to the Company's disciplinary procedure. On the balance of probability, there is more to it than that.

74. In Mr Harris's witness statement, he says this (WS18):

"However, I did speak to AN and informed him that when he was made aware of what was going on he should have put a stop to it. The issue here is that the Claimants were aware of the images and they instigated matters by showing the pictures and was ridiculing the member of staff on the website."

75. The difficulty with that from the Company's point of view is that the Company never investigated or got close to making a finding that either or both of the Claimants were ridiculing Ms X or instigated what had happened. Ms Westwood's report on Mr Ward's appeal made it clear that no instigator had been found (see paragraph 49 above). To the extent that there was any finding about who instigated the incident, it seems to have been attributed to Mr Ede. As Ms Westwood says (WS22):

"DE was issued with a final written warning on the basis of his involvement which was that he initiated the incident."

76. In short, the Company has not shown any difference between Mr Nuttall's behaviour during the incident and that of the Claimants. Arguably, Mr Nuttall's behaviour was the more serious given his seniority as a director. This leaves the Company resting on a consultant/director not being subject to the Company's disciplinary procedure. That is a fair point in the absence of the factors referred to in paragraphs 73-75 above. In that context, however, it is no more than a convenient excuse for what happened. On any objective view the implicit reprimand on file that Mr Nuttall received was a long step short of a final written warning. Of course, Mr Nuttall could not have been subjected to a formal written warning in relation to his employment but it could have related to either or both of his consultancy with the Company and his directorship.

77. In the Tribunal's judgment, the evidence shows that Mr Harris wanted both to suppress the fact of Mr Nuttall's involvement in the incident and minimise the impact of it on Mr Nuttall whilst, at the same time, showing no such clemency towards the Claimants. The Claimants, amongst others, were to be made an example of. That motivation was a fundamental breach of the implied term that employees should be treated fairly and a repudiatory breach of contract.

78. In reaching this conclusion, the Tribunal has reminded itself that it is not here considering the unfair dismissal test in relation to comparable sanctions. That test requires the comparator's circumstances to be almost identical. Here, the test is different and is a straightforward one of objective fairness.

79. Did Mr Ward and/or Mr Sullivan affirm the contract following any breach?

80. The issue is whether or not Mr Ward and Mr Sullivan, in delaying their resignations until they found other jobs, affirmed their contracts of employment and gave up the right to resign in the face of the repudiatory breach. The Tribunal is looking at the length of the delay and not the reason for it, which has been examined above. Both Claimants resigned some ten days after they had received their appeal outcomes. That delay is not enough to establish that either affirmed their respective contracts of employment.

81. Was there a fair dismissal?

82. This is a case in which the Company did not consciously dismiss either Claimant before their respective resignations. There is, therefore, nothing to be treated as a sufficient reason for doing so.

83. It follows that the Claimants' respective claims of unfair constructive dismissal succeed.

84. Contribution

85. The Claimants have succeeded in their claims of unfair constructive dismissal because of evidence of unfair treatment. That does not establish the propriety of their conduct in the events in question. It is far from doing so. The common facts are these. The Claimants, both in managerial positions, viewed posts of a fellow employee, Ms X, who seems to have been in the process of gender re-assignment. They did so during a works social outing in circumstances that could have been characterised by Ms X as unlawful harassment, even though she was not present and chose not to see events in that way. (For the avoidance of doubt, the Tribunal is not indicating that there was harassment. There may be many arguments to the contrary.) The fact that the occasion was an off worksite social event does not help the Claimants' cases. It is well established that, in these circumstances, there is no material difference between the work place and off worksite social occasions. The Company's stance that, as managers, the Claimants should have realised that what was happening was inappropriate and risked a claim of discrimination and put a stop to it, was perfectly justifiable. In that respect the Claimants were blameworthy and contributed substantially to their respective constructive dismissals.

86. The Tribunal finds it just and equitable to reduce any basic or compensatory awards made to the Claimants by 75% in this respect.

87. Remedy

88. Neither Claimant seeks a reinstatement or a re-engagement order.
89. On behalf of the Company, Mr Hoyle did not disagree with the arithmetic in the Claimants' respective schedules of loss (169-170, 185-186.) Mr Hoyle did, however, take issue with the periods of future loss claimed, the amounts claimed for loss of statutory rights and the claims for uplifts for a failure to follow the ACAS codes. No particular breach of the ACAS codes was identified by either Claimant. Of its own motion, the Tribunal has considered the ACAS Code of Practice on Disciplinary and Grievance Procedures. In context, the Tribunal can see no failure on the Company's part.

90. Mr Sullivan

91. Mr Sullivan was born on 29 August 1974. A week's gross pay for Mr Sullivan was £432.69 and the weekly difference in net pay between Mr Sullivan's old and new job's is £53.

92. Basic award:

1 (multiplier) x £432.69 x 6 (years) = £2,596.14
1.5 (multiplier) x £432.69 x 3 (years) = £1,947.10
Total: £4,543.24
Less 75% contribution - £3,407.43
Award: £1,135.81

93. Compensatory award:

Mr Sullivan claims 2 years loss for past and future loss of wages. There is no evidence, however, that he either has or intends to mitigate his loss by seeking higher paid employment. The Tribunal considers it just and equitable to award 26 weeks' loss.

26 x £53 = £1,378.00
£350.00 is awarded for loss of statutory rights
Total: £1,728.00
Less 75% contribution - £1,296.00
Award: £432.00

94. Mr Ward

95. Mr Ward was born on 23 March 1965. A week's gross pay for Mr Ward was capped at £508.00 and the weekly difference in net pay between Mr Ward's old and new jobs was £130.68 for the first 15 weeks and £123.94 thereafter.

96. Basic award:

1 (multiplier) x £508 x 5 (years) = £2,540.00

1.5 (multiplier) x £508 x 11 (years) = £8,382.00

Total: £10,922.00

Less 75% contribution - £8,191.50

Award: £2,730.50

97. Compensatory award:

Mr Ward claims 2 years loss for past and future loss of wages. There is no evidence, however, that he either has or intends to mitigate his loss by seeking higher paid employment. The tribunal considers it just and equitable to award 26 weeks' loss.

15 x £130.68 = £1,960.20

11 x £123.94 = £1,363.34

£350 is awarded for loss of statutory rights

Total: £3,673.54

Less 75% contribution - £2,755.15

Award: £918.39

Employment Judge Matthews

Date: 30 October 2019

Judgment and reasons sent to parties:
1 November 2019

FOR THE TRIBUNAL OFFICE