



5

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107544/2019

10

Hearing held at Dundee on 25 and 26 November 2019

Employment Judge I McFatridge

15

Mrs J Robertson

**Claimant
In person**

20

Dobbies Garden Centres Ltd

**Respondent
Represented by
Mr Singh,
Solicitor**

25

30

35

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claimant was not unfairly constructively dismissed by the respondent. The claim is dismissed.

40

REASONS

1. The claimant submitted a claim to the Tribunal in which she claimed she had been unfairly constructively dismissed by the respondent. The respondent submitted a response in which they denied the claim. The hearing took place over two days on 25 and 26 November 2019. The claimant gave evidence on her own behalf. Mr Townsend a General Manager with the respondent who had carried out a disciplinary investigation in the period leading up to the claimant's resignation gave evidence on behalf of the respondent as did Mrs Faulds a General Manager with the respondent who had carried out a disciplinary hearing which concluded shortly before the claimant's resignation. The claimant gave her evidence by means of a witness statement with the agreement of the respondent's representative. A joint bundle of productions was also lodged. On the basis of the productions and the evidence I found the following essential facts relevant to the claim to be proved or agreed.
2. The respondent is a substantial business operating garden centres throughout the UK. They have approximately 4000 employees. The claimant was employed by them as a Stock Controller in their Dundee store from 12 January 2014 until she resigned with immediate effect on 1 June 2019 in the circumstances referred to below. The claimant lodged a copy of her job description on the day of the hearing. The job purpose was to manage all stock related and goods receiving processes whilst adhering to company policies and procedures to deliver budgeted targets through effective training coaching and engagement of the store teams.
3. The claimant was seen by the respondent as a good employee who was excellent at her job. The claimant performed many other duties outwith her role and saw herself as being a "go to" person who other staff and managers could approach directly and she would attempt to deal with any issues which arose.
4. The claimant reported directly to the store manager at the Dundee store. Up until around March/April 2019 this was a Kevin Yates.
5. In or about February 2019 the claimant and others were advised that the Dundee store was to be receiving new restaurant furniture from the

respondent's Dunfermline store. The claimant understood that there was a possibility the old furniture at Dundee would simply be put in a skip. She felt that it was worth more than this and on 19 February wrote to the respondent's Head of Restaurants Adriano Trebbi stating

5 "I believe we are receiving Dunfermline restaurant furniture. The old tables and chairs we have here can we sell them to a merchant or put on ebay and the money it generates can go back in to store, it would be crazy to fill skips full of waste with this."

10 The e-mail was lodged (p45). Mr Trebbi e-mailed back copying the e-mail to David Gibson the respondent's Operations Manager stating

"Please take guidance from our property dept on what they want you to do with the old furniture."

The claimant responded

15 "Okay thanks can I just ask are we getting more furniture the same from Melville just so as we know what to throw away etc."

This e-mail was also lodged (p36). Mr Trebbi responded stating

20 "Yes, as soon as the temporary restaurant closes and the new restaurant opens, we will get some of Melville's furniture over to you (scheduled 11th March).

It will be different to the rattan style from Dunfermline, but this will enable us to create zones within your restaurant. Tables will be the same new grey style though." (p47)

Andrew Horrix who was the respondent's property manager also e-mailed the claimant stating

25 "Happy for you to realise some value for the store out of the old furniture."

This e-mail was lodged (p48). Shortly thereafter the claimant arranged to sell off the furniture to a local golf club and received £150 cash. The claimant e-mailed Mr Horrix on 26 February 2019 stating

“I have sold off some of the restaurant old furniture to a local golf club they are paying cash what do I do with it re process etc?” (p49)

It was common ground between the parties that the claimant did not receive any response to this e-mail.

- 5 6. Mr Yates who had been manager of the Dundee store was shortly thereafter appointed as manager of the respondent’s Perth store. A new manager, Mr Curran started at the Dundee store on or about 6 May 2019. The claimant knew him having worked with him for around four years. The claimant nodded to him in the passing on his first day at the store and had
10 a brief chat with him regarding unrelated matters. The claimant was then off for two days returning to work on 9 May.
7. In the meantime Mr Curran had received an anonymous complaint from a whistleblower who alleged that the claimant had sold furniture from the restaurant and that the money was due to be paid into the staff social fund
15 but that the claimant had not in fact paid the money over. The staff social fund is a fund which is administered on behalf of the staff. Monies are paid in from various sources and the money is used for things like staff nights out.
8. Mr Curran had made various enquiries about the situation and ascertained
20 that the claimant had indeed sold furniture from the store. Mr Curran had carried out a search but could not find the money in the store nor could he find out what had happened to it. Following the initial approach by the anonymous whistleblower Mr Curran was approached by another member of staff who raised the same concern. The second member of staff
25 indicated that they did not wish their name going forward under any circumstances and specifically advised that it should never be made known to the claimant that he was someone who had raised the issue. This individual was a Mr JW. On 9 May Mr Curran invited the claimant into his office. She asked if the matter could wait as she was about to start
30 her lunch but whilst Mr Curran said he supposed it could wait he also said it was to be a “closed door” meeting. The claimant said she would come now which she did. Mr Curran put it to the claimant that he had been advised that she had sold furniture and that the money was supposed to

5 go into the staff social fund. The claimant confirmed that she had sold the furniture but said that the money had not been intended to go into the staff social fund but that it was company money and as such should be paid into the company bank account. Her position was that she was waiting on someone from Head Office telling her how she could achieve this. She stated that Mr Yates had told her to simply hang on to the money in the meantime. The claimant said that she had the money in her house. She said that she had received £150 and that the golf club wanted to have more of the furniture when the additional furniture arrived from Melville.

10 The claimant became rather upset during the meeting as she felt she was being accused of taking the money herself when her position was that nothing could be further from the truth. She asked for permission to go home so that she could collect the money and Mr Curran allowed her to do this. The claimant went home and collected the money. The claimant

15 made it clear to Mr Curran that she had been entirely open about what she was doing and had discussed matters with a number of people in the store. She then came back and handed over £110 to Mr Curran. The claimant explained that shortly after the money was received Mr Yates was having his 50th birthday. It was her understanding that in the past Mr Yates had

20 either authorised things being taken out of stock to provide a birthday present for members of staff who were celebrating significant milestone birthdays or indeed used the company credit card for this purpose. The claimant's understanding was that members of staff at the store had authority to spend up to £50 on the credit card as effectively "petty cash".

25 Her position was that she had discussed with other members of staff the possibility of having a staff collection to buy a present for Mr Yates but other members of staff did not think this would work. The claimant's position was she then agreed with these other members of staff that she could use £40 from the sale proceeds to purchase something for Mr Yates

30 and she had purchased a bottle of vodka for him at a price of around £40 and he had been presented with this.

9. During the course of the meeting the claimant's position was that Mr Curran told her that was the end of the matter. On her way back to the office the claimant had met one of her colleagues who began the

35 conversation by indicating that it had not been him who had advised

Mr Curran. The claimant questioned him about it and this member of staff indicated that Mr Curran had been investigating the matter for the last few days. This further upset the claimant.

10. At around close of business that day the claimant handed a prepared letter
5 of grievance to Mr Curran. This document was lodged (p135). It stated

“I wish to make a formal grievance about defamation of character in the workplace.

I do not have the responsibility of proving statements and accusations made about me from an undisclosed person or persons were in fact
10 completely false and unfounded. It is Dobbies as my employer who made the defamatory statement to prove it was true.

I have all the evidence and witnesses I require and shall call upon as and when I need to.”

11. Shortly thereafter the respondent’s HR department prepared a letter
15 inviting the claimant to an investigatory interview under the respondent’s disciplinary policy. The respondent’s disciplinary policy was lodged (p42-44). The letter of invitation bore to be signed by Elaine Faulds however it would appear to have been prepared by the respondent’s HR department without reference to Elaine Faulds. It is unclear whether this was sent to
20 the claimant at the time.

12. In any event at around this time Mr Townsend who was manager of the Aberdeen store was asked to carry out a disciplinary investigation into the matter by his manager, Mr Gibson, who gave him a brief outline of the issue. Mr Curran also wrote to Mr Townsend on 13 May 2019 setting out
25 what he had done to date. The e-mail was lodged (p52). It is as well to set it out in full.

“Hi Mark,

Details surrounding investigation.

Invite to investigation is for monies being held from the sale of
30 company property.

Detail behind this is.

The store got permission to sell the old restaurant furniture to a golf club from Andy Horrix, the proceeds were to go back into the store.

The sale took place around Mid March, total sale was £150.

Kevin was aware that this was happening, and that it was all being dealt with by his stock controller Jill Robertson.

5 Kevin went on holiday when the sale was done, and on his return is told that the money has gone into the staff social fund. Kevin will send me a statement with details of the event.

Jill claims to have asked Janet Buchan at CSO how the money should be banked, to date I have no confirmation of this.

10 After a couple of days in the role at Dundee, I was asked by 2 members of staff if I was aware of where the money from the sale of the furniture had went, it was their belief that Jill still had the money and it had not been banked to staff social fund. From there I tried to trace where the money had gone, Restaurant Manager did not know, Kevin was told it was banked to social fund, I contacted CSO and was
15 told that no money had been banked for this.

I took advice from HR, they advised to fact find from Jill where the money had went, Jill explained she still had the money at home, she said she was holding onto it as they were expecting a further sale of furniture and wanted to bring all the money in together, she did not
20 trust the money not to go missing from the safe.

After our discussion Jill and a colleague Linzi Kilburn went home and got the money. Jill explained that there was only £110 as £40 had been used to buy Kevin a birthday present.

25 I will forward Kevin's statement when I get it, I have also asked for one from Jack the Restaurant Manager.

Give me a call if you want to discuss."

Shortly thereafter Mr Curran forwarded to Mr Townsend a copy of an email which he had received from Kevin Yates. This was lodged (p53). It stated

"Hi Colin

30 As per our conversation please see below what I can recall re the old table & chairs from the restaurant.

- Used Restaurant tables and chairs were being sent from Dunfermline to Dundee to refresh the seating area.

- Old tables and chairs were to be binned or sold off for anything we could get – I think this was Adriano that had said this to Jack.
- New tables and chairs arrived in store approximately the last week in Feb or early march and went into the House of Angus. Jack then swapped the tables and chairs over the old tables and chairs put into the House of Angus. At this point I was just going to bin them as didn't think anyone would buy them.
- I went on holiday 9th March-17th March – the tables and chairs were in H.O.A. when I left.
- Came back from holiday 17th March I am sure I did a walk of store & H.O.A. on my first day back – the chairs had gone from H.O.A.
- Went to the General Office and asked Jill – who was at her desk – if she knew where the chairs had gone.
- I was told by Jill they had been sold to the local golf course for £150 this had been authorised I am sure she said by Adriano and had an email to say it was OK to sell and that the £150 had been put into the staff fund.
- As the chairs weren't there and the I was told the money was in the staff fund I did not question further as was happy with what I had been told."

13. At around this time Mr Curran also obtained an e-mail from the initial whistleblower which was lodged (p55). It stated

"I was aware that Colin had been told about money from the sale of chairs from the restaurant that Jill Robertson had kept hold of. I went to Colin to inform him about the money as I was worried that I would get into trouble about knowing. Jill had brought the money up in conversation to me when we were talking about buying a gift for the store manager's birthday. At the time she told me she was holding on to money to see if the manager would ask her for it as she was not happy about an incident. She told she had the money in her purse and it was £150." (p55)

14. In preparation for his meeting with the claimant Mr Townsend viewed the e-mail from Kevin Yates which he had been forwarded by Mr Curran. He decided that he wished to check matters further with Mr Yates. He e-mailed Mr Yates on 14 May 2019 (p56). He asked him to type a statement and send it to him since this would negate the need for him to visit Mr Yates when he was travelling to Dundee. He asked him a number of questions.

15. Mr Yates responded in an e-mail sent later that day (p57). He stated

“• **What instruction if any did you give regards the proceeds?**

– It was known to myself and the restaurant manager that the chairs were to be binned or sold off – not 100% sure who else knew this I am sure the instruction came from Adriano re this.

• **In terms of the person I am seeing, did you give her proxy over handling the sale and any proceeds?**

– No, as I was unsure of what was happening to them, I was going to bin them due to the fact they were extremely old – at least 10 years old. I hadn't even thought of how to sell the chairs etc.

• **Were there any instances where you had suspicion of any wrongdoing of this or any other manner which you have no evidence of but would make sense in relation to what we now know?**

– No I had no suspicions the whole thing was done on my weeks holiday and when I questioned Jill I was told the money was in the staff fund, I didn't question further as thought the money was banked. I have no idea why she held on to the money at all. Financially as far as I am aware she is very comfortable her husband had an extremely good job and took early retirement 2 years ago, she herself had reduced her contracted hours about 3 years ago. She has 15 years service as stock controller with no instances of lack of trust, integrity coming up before this instance.”

Mr Townsend who is the manager of the respondent's Aberdeen store and has considerable experience of conducting disciplinarys for the respondent and a number of previous employers travelled down to Dundee on 17 May to meet with the claimant. In advance of this he

received a further statement from Mr Curran which Mr Curran had obtained from a Jack Woollett. The statement was lodged (p58). It read

5 "At the middle of February I was made aware that we would be receiving a delivery of new chairs and tables during Dunfermline's mini refit in the restaurant. On hearing of this I approached Paul our warehouse guy and spoke to him about how we would dispose of this due to them being metal and wood and the cost of a skip. When we realised the amount of time it would take to dismantle all the chairs into different materials for recycling Jill emailed Adriano to see if we could sell them. He asked us to speak with Andrew Horrix (head of property) regarding this and he said if we could that was fine.

10 I was unsure of the amount given for the chairs and tables sold and I was unaware of what would happen with the money but there was potential for donating it to charity or it going into the social fund. After I had put the chairs into the House of Angus for collection I did not have any further involvement with the chairs and tables. I was told we would potentially get another delivery of new chairs and tables which the same company were willing to buy from us also but this never came."

20 Mr Townsend met with Ms Robertson, the claimant, on 17 May. The meeting started at 12:30, adjourned from 13:30 to 14:00 and then it finally ended at 15:15. Mr Townsend was accompanied by Derek Lomas who took notes. The claimant was accompanied by JW. The claimant was unaware that JW was one of the individuals who had contacted Mr Curran and raised the concerns which had led to the investigation. Mr Townsend was aware of this but did not raise the issue with the claimant. A handwritten note of the meeting was prepared and signed on each page by the claimant (p61-79). I considered this to be an accurate record of what took place at the meeting. The claimant's position was that there was never any question of the money going into the staff social fund. Her view was that the money quite clearly belonged to the company and was to go into P&L. She maintained her position that Mr Yates had told her to hold on to the money in the meantime. She indicated that she was aware that there was more furniture to be coming from another store and the golf

club had agreed to buy this when it arrived so there would be more money coming in due course. Her position was that Mr Yates was fully aware of what was going on and had told her to “just hold on to” the money. With regard to the payment of £40 she indicated that she had discussed this with other people in the back office and named them as MO, MB and CS. The claimant was unaware that CS was the other person who had raised the concerns with Mr Curran in the first place and who had provided the statement at page 55. The claimant had seen the statement at page 55 (discussed at pages 92-93 in notes).

10 16. At the end of the meeting Mr Townsend stated that he would speak to Mr Curran and get a statement from him and then summarise and decide where to go next.

15 17. Following this Mr Townsend met with Mr Curran. He met with him in the restaurant onsite. Mr Townsend thought this was the best place since he and Mr Curran were able to find an area where they would not be overheard. He was concerned that within the back office there were always a number of staff present. The claimant saw Mr Townsend meet with Mr Curran and felt this was inappropriate. The note of Mr Curran’s meeting with Mr Townsend was lodged (p78-79). It does not have a heading but is signed by Mr Curran and Mr Townsend on each page. I considered that this was an accurate record. He referred to the meeting with the claimant. He said that this was a closed door meeting. Mr Curran said it was essentially a fact find since he was trying to work out what had happened. He addressed the issue of the claimant’s assertion that he had told her that the matter was closed. He confirmed that what he had said was “I said I’m hoping we can put this to bed and that will be the end of it.” Mr Townsend asked him what was stopping him closing the matter and he stated that he was awaiting confirmation from HR on the next steps. Mr Townsend asked him if he categorically did not say that was the end of it and he confirmed that he had not. He said that at that stage he was not comfortable with it being done and dusted and he had to contact other people such as HR before moving forward.

18. Following the meeting with the claimant Mr Townsend decided that he required to contact Mr Yates again and obtained further clarification from

him. In particular he asked for a written statement. Mr Yates spoke to Mr Townsend and produced a further statement which was lodged (p80). Mr Yates responded once again to questions which were put to him by Mr Townsend. Mr Townsend stated

5 “Jill in her account of events has said that she was told by you to hold onto the proceeds of sale of the restaurant furniture until such time as further exchanges of furniture had been completed. To the best of your knowledge is this accurate or fictitious?”

Mr Yates' answer was

10 “No. This is not correct, I asked about the furniture on my return from holiday. I was told that the furniture had been sold and that the monies £150 was in the staff fund.”

The note goes on to state

15 “That brings me to a second point, Jill categorically states that this monies was never meant for the staff fund, in fact it was to be credited to the P&L as had happened in the past with sale of printer cartridges as a result of a printer upgrade. So who or what lead you to believe this was where the monies was going?

20 As I said in my statement, once I had established that the Tables & Chairs had been sold, Jill then told me that the monies was in the staff fund.

25 I remember her saying this to me in the general office and that it was in her own words ‘all above board and she had emails to back this up and not to worry as it was all sorted’. I did not question further as if Jill said she has done something it means its done.”

The next question was

30 “Did you not think to check that this was correct, if not why?
Jill is a long serving trusted employee, she knew what she was to do and how to do it, as she had told me the monies had been placed there I believed that she had done as she advised. I did not think I needed to check this. Jill has always been trustworthy in the past doing as she said she would.”

19. Mr Townsend decided to meet again with the claimant and met with her on 20 May 2019. On this occasion Mr Townsend was accompanied by Yvonne Bernard who took notes. The claimant was once again accompanied by JW. The claimant remained unaware that JW had been one of the individuals who had first contacted Mr Curran about the issue. A handwritten note of the meeting was produced (p81-98). The claimant indicated at the end of the meeting that she was not prepared to sign this and prepared her own additional notes which are lodged at page 99.
20. During the course of the meeting the claimant maintained her position. With regard to the decision regarding the £40 she once again said that this had been agreed with others. The claimant referred to this having been at the beginning of March.
21. The claimant gave the name of the staff members with whom she alleged she had discussed using some of the money to buy a gift for Mr Yates. They were MO, MB and CS. At the end of the meeting it records that Mr Townsend told the claimant that he had decided that matters would proceed to a disciplinary process and that the claimant would be charged with the allegation of taking money out of the store. He indicated that the respondent would be in touch in writing.
22. Mr Townsend produced an investigation summary sheet setting out his summary conclusions and investigation. In the report he noted that his method of investigation had been interviews with the claimant and Mr Curran on 17 May. Statements from (anonymous) employee dated 14 May and statements from Kevin Yates written by him on 14 May and 18 May. Under Summary Conclusions and Recommendations he wrote
- “Jill has declared at her investigation meeting that she had held onto the monies until asked for by Colin Curran at a closed door meeting, when as a result of this meeting she went to her home with a witness to collect the remaining proceeds of the sale of goods.
- She has claimed she had been instructed by manager at the time Kevin Yates to keep hold of the proceeds of the sale, as further goods may still be sold. Kevin Yates has stated in his statement on 18.5.19

that this is not true and that he had been lead to believe that the monies had been banked into staff funds.

Jill states that the monies were categorically bound for company P&L once banked and were never for staff funds, this contradicts what she told her own GM at the time of asking.

Jill then went on to use £40 of the £150 funds to pay for a 50th birthday present for Kevin Yates which was presented to him on 9.3.2019 as per photograph obtained from Yammer. Jill agreed this with colleagues, despite this monies being company funds. Jill states that she believed she had authority to do this as she was in a “managerial” capacity and was trusted by the company, she also stated that in any case these monies would not have existed had she not taken ownership of the skipped goods under permission and found an outlet to sell them.

In my conclusion Jill has acted without permission on a number of levels.

1) Retained monies which should have been banked into company accounts, which enabled access and use of monies without check. If not able monies should have been placed in safe.

2) To use monies without permission for social use, authorisation of which should have been obtained from senior managers or RM.

3) To act as a manager which is due to years of service, and position rather than by appointment, making decisions without consultation of senior managers which appear through the conversations at the investigatory meeting to describe an individual whose belief was she was able to act without check.

4) I have a firm belief that had this matter not been brought to the attention of the New GM by a staff whistleblower(s) then this monies would never have been recovered by the company due to this detail not being discussed as part of the handover between the incoming and outgoing manager.

Recommend that this investigatory warrants moving to formal disciplinary procedures on the grounds that there has been a Breach of Company process – in monies belonging to the company having been removed from company property by Jill Robertson.” (p59-60)

23. At some point which was most likely on 27 May 2019 a Mr Townsend met with MO, MB and CS the three individuals with whom the claimant said she had the discussion about the gift to Mr Yates . A note of the meeting with MO was lodged (p100—102). The note states that the meeting was convened by “Mark Sutherland” but I took this to be a misprint for Mark Townsend. MO said that there had not been such a conversation. He said he had not been aware there was a present bought. He recalled a conversation regarding a leaving present for Mr Yates and that he had said that if the staff didn’t want to give money we couldn’t make them. MO said he was not aware of any discussion regarding the money from the sale of the restaurant furniture. This statement was lodged (p100-102). A meeting also took place with MB on or about 27 May. He also denied any knowledge of such a conversation and stated that:

“I’ve never agreed with these presents and always seemed selective presents I believe in the past has been through store stock transferred out, always seemed to be for the favourites.”

There was also lodged a further statement to be taken on 27 May from CS. This bears to have been taken by Mark Townsend. It confirms that CS had no recollection of the conversation referred to by the claimant.

24. On 28 May 2019 the respondent wrote to the claimant inviting her to a disciplinary hearing to take place on 31 May 2019. The letter was lodged (p113). It appears to be signed on behalf of Mark Townsend but the letter was in fact prepared by the respondent’s HR department. Although Mr Townsend had made the decision to refer the claimant to a disciplinary hearing he did not see this letter or have anything to do with it before it was sent out. The letter confirmed the purpose of the hearing was to discuss the claimant’s alleged misconduct with regard to monies being held from the sale of company property. The claimant was advised

“if the allegation is found to be proven, it will be considered Gross Misconduct under the Company Disciplinary Procedures and your employment may be summarily terminated.”

25. In the meantime, on 22 May 2019 the respondent’s Regional Manager, David Gibson wrote to the claimant regarding her grievance. The letter

was lodged (p136). The letter confirmed that the respondent had received the claimant's grievance and indicated that in accordance with the policy they would be in contact with the claimant to organise a date to hear her grievance. The respondent wrote again to the claimant on 31 May 2019 inviting her to a grievance hearing. The claimant could not attend on that date. The claimant e-mailed the respondent on 1 June 2019 seeking to fix an alternative date. There were a number of e-mails passing regarding fixing the date and on 13 June 2019 the respondent wrote to the claimant seeking to hold a rescheduled grievance hearing on 19 June 2019. As can be seen below by this time the claimant had resigned and the claimant declined to attend the hearing.

26. In advance of the disciplinary hearing fixed for 31 May the claimant produced a statement. This document is dated 29 May and was lodged (p112). This states

"I made a good faith error in judgement, albeit I was to 'just hold on to it' as I am in a position of great trust it was a mistake perhaps but none done maliciously or with any wrong doing or deception and as soon as I was asked about the money I have always been honest and told everything as it was. I returned the money immediately when I was asked as I had totally forgotten all about it. My mind and thoughts have been elsewhere and as soon as the other furniture arrived for Dundee then it would have triggered my memory.

It was not a wilful or wanton disregard to my employer or a deliberate violation of any policies or procedures be known to me as there is no process as it was not 'actual SOH SKU real stock' on any inventory. There was no carelessness or negligence that has caused any serious bodily harm to my employer or any employee.

It may be a form of negligence but this inadvertence in an isolated incident ie: making a one-time mistake does not constitute misconduct.

In the matter with regards to the purchase of a bottle of Ciroc vodka for the Manager Kevin Yates 50th Birthday this was done to be nice not in any deceitful or dishonest way. It was a milestone birthday and what is wrong with showing appreciation to your manager would all

managers not like to be held in this regard albeit people did not want to make any donation towards the present, staff never do.

I am a nice person, I help others, I am honest and reliable. This whole incident has proven a great strain on me and my well-being having suffered from anxiety and depression for over two years but I try and hold it together and do not let it affect my work or my integrity ever.

However, as this has been going on since the 9th May 2019 to my knowledge yet being discussed prior to this from the 1st May 2019 and has deeply affected me physically and emotionally. I am so stressed that I feel unable to speak about this matter at the moment without bursting in to tears.

I have had seven hours of investigations and could not comprehend that it went to a disciplinary.

I cannot say anymore on the matter at this time so I will leave the decision in your hands and please let me know the outcome.”

27. The disciplinary hearing was chaired by Elaine Faulds. Elaine Faulds and the claimant were well known to each other and were on good terms. The claimant was once again accompanied by JW. Ms Faulds was accompanied by Sean Park who took notes. The meeting lasted from 11:00 am until 13:19 with two breaks. A note of the meeting was lodged (p114-134). Mr Park's note was signed at the bottom of each page by the claimant. I considered this to be a factual and accurate record of what took place at the hearing.

28. Ms Faulds saw the claimant's statement prior to the disciplinary. The statement was referred to at the hearing. Ms Faulds also had copies of the previous statements and Mr Townsend's investigation summary. The claimant was comfortable and relaxed during the meeting and Ms Faulds felt that the claimant was happy that it was Ms Faulds (someone known to her) who was taking it. During the meeting the claimant made the points she had previously made to Mr Townsend. She also said that she had checked Mr Yates' holiday record and it was her view that he had not been on holiday at the time the money was received as he stated. Mr Yates' schedule was lodged (p148-150). This shows that Mr Yates was on holiday from 11-23 March. It was the claimant's view that the money had

been received towards the end of February. The claimant also told Ms Faulds that she had not kept money in the safe as previously money had gone missing from a safe. She maintained her position that the money had never been for the social fund. Ms Faulds was concerned that if the money was not intended for the social fund but was store money then it should not have been used to purchase a present for Mr Yates.

5

29. At the end of the hearing Ms Faulds stated that she was not going to make a judgment at the time. She said she wished to take time to review her notes and the witness statements. The claimant indicated to Ms Faulds that she was upset as she had wanted an outcome there and then. She indicated she was happy at how the disciplinary had gone but wanted an outcome there and then.

10

30. Following the meeting, before Ms Faulds had come to any view on the matter, the claimant submitted a letter of resignation to the respondent. The letter of resignation was lodged (p143). It was dated 1 June 2019. It stated

15

“I am writing to inform you that I am resigning from my position of Stock Controller at Dobbies Garden World, Monifieth with immediate effect. Please accept this as my formal letter of resignation and a termination of my contract after 15 years loyal and exemplary service.

20

I feel that I am left with no option but to resign in light of all the recent experiences regarding alleged allegations and behaviours which have amounted to a breach of trust and confidence.

25

This includes disciplinary proceedings which were manifestly unreasonable, bullying and causing immense stress and anxiety to me, with no regards for my wellbeing.

30

I am forced to resign in response to the conduct of managers within the business which has made my position untenable whatever the outcome of the disciplinary process and the lack of fairness having submitted a grievance.

My working environment has permanently changed for the worse, with the irretrievable breakdown of any working relationship between myself and the management.”

31. Immediately following her resignation the claimant made arrangements with her daughter to commence working in her daughter's jewellery store. The position was originally to be on a temporary basis until Christmas. The claimant produced a schedule of loss (p37A-37B). She did not claim
5 in respect of pay differential between her new job and the old job but did claim in respect of lost pension benefits. In her previous job her employers made a monthly contribution of £29.23 to her pension. There is no such contribution in her current job.

Matters arising from the evidence

10 32. Although I considered that all of the witnesses were genuinely trying to assist the Tribunal by giving honest and truthful evidence as they saw it there were a number of matters where parties' recollections did not coincide with the contemporary documents and where I required to make a judgment as to what my findings in fact should be. I should note at this
15 stage that it is my role to only make findings of fact which could be potentially relevant to the claimant's contention that the respondent was in repudiatory breach of her contract. It is not part of my role to ascertain exactly what happened in respect of the £150 which the claimant obtained from the sale of the furniture or for me to determine whether the claimant
20 or Mr Yates and the other respondent's witnesses were telling the truth in relation to this.

33. The principal matter where I found the evidence to be unsatisfactory was in relation to Mr Townsend's meeting with the witnesses MO, MB and CS. Mr Townsend's oral evidence was to the effect that he had spoken to these
25 three individuals before he met with the claimant on 20 May. The difficulty is that the contemporary notes which were produced at the time and signed by the various witnesses all bear the date 27 May. Furthermore, one of the notes states that the interviewer was Mark Sutherland although it appears to be signed by the person who had signed the notes of the
30 interviews with the claimant which were quite clearly carried out by Mr Townsend. Mr Townsend's evidence was that he was absolutely certain he had only come to Dundee twice. He stated that he had met with the three witnesses in the restaurant of the garden centre. His view was that the date on the note must be incorrect. Looking at the matter carefully

it is my view that Mr Townsend's recollection must be incorrect and that he did meet with the three witnesses but did so on 27 May which is the date on the note. I have two reasons for considering this. The first is that the notes themselves have been dated 27 May not just at the beginning but also next to each individual's signatures. Whilst I was generally unimpressed with the quality of written record keeping by the respondent's HR department I think it highly unlikely that three individuals as well as Mr Townsend would have made the same mistake about the date. I do note that on page 100 it states that the interviewer was Mark Sutherland rather than Mark Townsend I note that the interview which starts on page 103 has Sutherland scored out and Townsend written in. I think that this is simply a mistake and that the note was produced by Mr Townsend. With regard to the date I also note that the times during which these interviews took place overlap with the time the interview with the claimant took place on the 20th. It therefore appears to me that if Mr Townsend was correct that he spoke to them on the 17th after he had spoken to the claimant then the times must be incorrect as well as the dates. The same applied if he had spoken to them on the 20th since the times recorded overlap with the times he was speaking to the claimant. I felt Mr Townsend had spoken to the three staff members since he was able to give clear evidence about this. I just thought he was mistaken about the date. I felt that in general terms Mr Townsend was an impressive witness who had carefully considered the matter before him and tried to do as good a job of the investigation as he could. I felt that in this instance his memory was simply faulty in that he must have been to Dundee on three occasions rather than two. I would imagine that he is an extremely busy person and when asked to recall specific events which happened six months ago it is understandable that he has made this error. Apart from that it appeared to me that the course of the investigation in this case was pretty much agreed between the parties.

34. The other matter where I considered I required to look carefully at the facts was in relation to the claimant's assertions at the hearing that Mr Cummings had behaved inappropriately to her during the course of conversations during and after the initial conversation on 9 May. The claimant's position was that the conversation on 9 May had been an

interrogation. She also accused Mr Townsend of being nasty and belittling and not letting her speak. None of this was foreshadowed in the claimant's ET1 and, for what it is worth, the claimant did not in fact put this allegation to Mr Townsend when cross examining him. The allegations against both
5 Mr Townsend and Mr Cummings were extremely inspecific. I accepted the respondent's position which was to the effect that throughout the process the claimant had at no time complained about the way that Mr Cummings spoke to her. The grievance which she lodged on 9 May immediately after the meeting which she now describes as an
10 interrogation does not make any specific complaint about Mr Cummings. I decided that I could not accept the claimant's evidence in this regard. I have no doubt that the claimant found it extremely upsetting to be accused of wrongdoing in relation to money particularly in circumstances where in her perception at least she felt she had not done anything other than
15 perhaps make an error of judgment. I have insufficient evidence before me to find that either Mr Cummings or Mr Townsend behaved inappropriately to her at any point.

Discussion and decision

Issues

20 35. The sole issue to be determined by the Tribunal was whether or not the claimant had been unfairly constructively dismissed by the respondent. In this case I first of all had to decide whether the claimant had been dismissed at all. The claimant claimed that she had been constructively dismissed whilst the respondent's position was that she had simply
25 resigned. I required to decide whether or not there had been a dismissal. In the event that I did find there had been a dismissal I would then have required to go on to determine whether the dismissal was fair or unfair in terms of section 98 of the Employment Rights Act 1996.

Discussion and decision

30 36. The respondent and the claimant both made full submissions. The respondent's were in writing and referred to various authorities. The claimant's, although they did not go into the law in forensic detail, clearly set out the claimant's position in respect of the matter.

37. I shall not attempt to summarise either party's submissions but will refer to them where appropriate in the discussion below.

38. I considered that the respondent accurately set out the law on the matter in his legal submissions. The claimant is claiming that she is dismissed in terms of the Employment Act 1996 Section 95(1)(c). This states

“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.”

39. Over the years the higher courts have given guidance to Tribunals as to how section 95(1)(c) should be interpreted. The key case of **Western Excavating ECC Ltd v Sharp** makes it clear whether an employee is entitled to terminate his contract of employment by reason of the employer's conduct and claim constructive dismissal must be determined in accordance with the law of contract. I would agree with the respondent's submissions that in order to claim constructive dismissal a claimant must show that four conditions have been met.

- (1) First there must be a breach of contract by the employer – in this case the claimant claimed a breach of the implied term of trust and confidence;
- (2) that breach must be sufficiently important to justify the resignation or it must be the last in a series of incidents which justify the resignation;
- (3) the claimant must end their employment in response to the breach and not for some other unconnected reason; and
- (4) the claimant must not delay in terminating their contract of employment.

40. As mentioned above I understood the claimant's case to be that the respondent had breached the implied term of trust and confidence. There is authority that an employer's initiation and subsequent conduct of disciplinary proceedings against an employee may in certain

circumstances amount to a breach of the term of trust and confidence. The implied term was defined in the case of ***Woods v WM Car Services (Peterborough) Limited*** that there is implied in a contract of employment a term that the employers will not without reasonable and proper cause conduct themselves in the manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. In the case of ***Lewis v Motorworld Garages Ltd [1985] IRLR 465 CA*** where that looking at whether or not a breach of the implied term of trust and confidence has taken place the Tribunal is entitled to look at the employer's conduct cumulatively. The case of ***London Borough of Waltham Forest v Omilaju [2005] IRLR 35 CA*** sets out the general approach which the Tribunal should take in that situation.

41. Whilst it is clear that in general terms an employer is entitled to investigate allegations of misconduct against an employee and indeed institute disciplinary proceedings if this is appropriate an employer may still be guilty of a breach of the implied term of trust and confidence if their conduct is so unreasonable as to constitute a breach of the implied term. A recent example of this can be found in the case of ***Retirement Security Ltd v Wilson UKEAT/0019/19***. We were referred by the respondent to the case of ***Working Men's Club & Institute Union Limited v Balls UKEAT/0119/11*** which in paragraph 29 EAT issues a reminder that "Tribunals should be slow to treat the initiation of an investigation as itself a repudiatory breach: very often an employer may act reasonably in investigating allegations of misconduct but the question of reasonableness is one of fact."

42. The claimant highlighted a number of reasons why she believed that in this case the respondent had behaved unreasonably. We would agree with the respondent that these could be summarised as being

1. That she was asked about money owned by the respondent in her possession on 9 May by Colin Curran;
2. that Colin Curran subsequently made demeaning comments towards her;
3. that the respondent commenced an investigation;
4. that the matter proceeded to a disciplinary hearing;

5. that the respondent did not deal with her grievance in a timely manner; and
6. that the investigation into her conduct was in response to her raising the grievance.

5 In this case we would add the suggestion made by the claimant in evidence that Mr Townsend had also behaved to her in an aggressive manner however as with the allegation against Mr Curran I did not find it established as a fact that either Mr Townsend or Mr Curran had behaved inappropriately. With regard to the first interview Mr Curran was perfectly
10 entitled to ask the claimant what had happened to the money. The situation here was that on the claimant's own admission she had taken home money belonging to the company and held on to it for a period of time. She only told Mr Curran that she had this money when he specifically asked her about it. Initially when she had control of what she
15 stated to be company money she used part of that money to buy a present for her manager without obtaining any authorisation from anyone else.

43. In my view it was entirely reasonable for the respondent to commence an investigation given the circumstances reported to Mr Curran. The position was that very soon after Mr Curran started as manager he receives an
20 allegation from two employees who at the time wished to remain anonymous (but one of whom is prepared to put their complaint in writing) that the claimant has held on to £150 that the complainers believed was supposed to go into the staff social fund. Mr Curran commenced his investigation of this and spoke to various individuals informally in the few
25 days before he spoke to the claimant on 9 May. It is clear that the claimant found it extremely upsetting when she found out that he had been carrying out these investigations but in my view there is absolutely no question but that he was entitled to do this. Mr Curran then behaved appropriately by calling the claimant into a meeting. It was clear that the claimant found
30 this meeting very upsetting. That having been said I could see nothing in the fact that Mr Curran held such a meeting as being in any way unreasonable. The respondent are a retail business. The staff handle substantial sums of money on a regular basis. The claimant herself indicated that she held a position of considerable responsibility. On any

view Mr Curran as manager was obliged to investigate the allegation which had been made.

5 44. I reject the claimant's complaints about the way Mr Curran carried out his investigation firstly because the claimant did not complain about them at the time either in her grievance to Mr Townsend or to Ms Faulds. Secondly, it is clear from the claimant's own account that Mr Curran showed her some understanding in that he allowed her time off to go home and fetch the money since this was clearly something which upset the claimant.

10 45. The claimant's position is that Mr Curran told her that that was the end of the matter. Mr Curran denied this. When asked about this by Mr Townsend, he said that he told her that he "hoped" it was the end of the matter. I have no doubt that in those circumstances any reasonable manager would wish to check the position with the company's HR department and this is clearly what Mr Curran did. In my view it was certainly not unreasonable for the HR department to then set up an investigation. My view is that this is what any reasonable employer would do.

20 46. With regard to the conduct of the investigation, as noted above, I considered that Mr Townsend was conscientious and dealt with the investigation properly. He clearly saw Mr Yates as being a key witness. Although Mr Curran had already given him a statement from Mr Yates, Mr Townsend himself contacts Mr Yates to get a further statement in advance of the meeting with the claimant. He then gets in touch with Mr Yates again to get a third statement from him. Mr Townsend also speaks to Mr Curran and specifically puts to him the point made by the claimant. Mr Townsend also has access to the one of the original complainers. Mr Townsend holds two meetings with the claimant to ascertain her position. By the meeting on 20 May the position is that Mr Townsend has been told by the claimant that Mr Yates knew that she had the money at home and had authorised it but Mr Yates has on three occasions confirmed that that is not the case. He has also had Mr Curran confirm that he did not tell the claimant that the matter was concluded. It appears from the terms of the note of meeting on 20 May that it was at

5 that stage that Mr Townsend made his decision that the matter should go to a disciplinary. In my view there is nothing at all unreasonable about this decision. The original issue is concern that the claimant had £150 of company money at home. The claimant accepted that this was the case but she claims to have been authorised to do this by Mr Yates but Mr Yates disagrees. His position, like that of the original complainer is that the money was supposed to go into the social fund and he understood that this is what the claimant had done with it. In my view it was not at all unreasonable for Mr Townsend to decide to move the matter on to a disciplinary hearing.

10 47. The claimant's position was that in some way the investigation was started as retaliation for her submitting a grievance. In my view the facts do not support this allegation. It is clear that Mr Curran was already investigating matters before the claimant put her grievance in. It was also not established in evidence that Mr Townsend even knew that the claimant had submitted a grievance.

15 48. As noted above there was a dispute as to when Mr Townsend spoke to the additional three witnesses. These witnesses were spoken to in relation to what was essentially the second part of the allegation against the claimant; which was that she had taken £40 from the money to buy a present for Mr Yates without authorisation. The claimant's position was that it was unreasonable for the respondent to have made the decision to go to a disciplinary hearing before they had spoken to these witnesses. I disagree. As noted above I consider that the respondent had ample reason for going to a disciplinary based on the information available to Mr Townsend on 20 May.

20 49. It is not at all unusual for investigations to continue after the decision is made to start disciplinary proceedings. It is not at all unusual for the disciplinary manager to carry out further investigations and indeed for an appeal manager to carry out further investigations. In this case the claimant had stated that she had discussed using the money from the sale of the furniture to buy Mr Yates a present with three other named employees. One of these was, unknown to the claimant, one of the people who had made the original complaint against her. Mr Townsend then

spoke to these three individuals and found that, just like Mr Yates, they did not support the claimant's contention in any way. In my view there was nothing unreasonable about this, it was simply an example of Mr Townsend carrying out a thorough investigation.

5 50. As far as the disciplinary hearing itself is concerned I did not understand the claimant to make any particular criticism of Ms Faulds. It would appear that the claimant was given a full opportunity to provide her own explanation for matters which she did. I also accepted that as at the point where the claimant resigned, Ms Faulds had not come to any decision.
10 Her position in evidence was that what the claimant was accused of could amount to gross misconduct. Given that it involved taking company money home and holding on to it, it is difficult to quarrel with that. Ms Faulds had however not made a decision since she wished to mull over in her mind the particular circumstances of this case and the claimant's explanation. This was entirely proper.
15

51. Up to this point I was entirely satisfied that there was nothing which the respondent had done which was itself unreasonable.

52. It may be that had the respondent gone on to dismiss the claimant, the claimant may have been able to argue that her dismissal was unfair but
20 what I can say with certainty is that up to the point where she resigned there was nothing in the conduct of the respondent which came even close to amounting to a breach of the implied term of trust and confidence.

53. The final point made by the claimant was that the grievance was not dealt with timeously. I was satisfied that the respondent contacted the claimant at the very latest by 31 May which was less than a month after the
25 grievance went in. Whilst grievances should be dealt with quickly I do not consider that this delay either on its own or cumulatively with any other infelicities of the respondent's procedure comes close to amounting to a breach of the implied term. Similarly, as noted above I did not consider
30 that there was any evidence whatsoever that the investigation had been prompted by the claimant submitting a grievance. I also do not think the respondent can be criticised for failing to tell the claimant that her chosen companion (JW) was one of the people who had first raised the complaint

about her. JW had clearly sought to make his complaint in confidence and the respondent were entitled to respect that confidence.

54. In this case there was no breach of contract and therefore the claimant was not entitled to consider herself constructively dismissed. I quite appreciate that for the claimant this has been a traumatic experience. As noted above she gave very good service to her employers for a number of years. She accepted in her own statement of 29 May that she had committed an error of judgment. I do not think that there is any doubt about that. Her position is that the matter was simply an error of judgment and that there was no suggestion of any dishonesty and this was not suggested at the hearing. That having been said, in my view the respondent was perfectly entitled to behave as they did in investigating the matter and thereafter referring the matter to a disciplinary hearing. Since there was no breach of contract the claimant was not dismissed and the claim of unfair dismissal must therefore fall.

20

25

30	Employment Judge:	Ian McFatridge
	Date of Judgment:	10 December 2019
	Date sent to parties:	10 December 2019