



EMPLOYMENT TRIBUNALS

Claimant: Ms J. Ogbonna
Respondent: Capital City College Group

Heard at: London Central by CVP

19 April 2023

Employment Judge Goodman

Representation:

Claimant: in person

Respondent: Anthony Johnston, counsel

RESERVED JUDGMENT

The unfair dismissal claim fails.

REASONS

1. The claimant was employed by the respondent as a lecturer in forensic science at City and Islington College. On 24th June 2022 she resigned. She has presented a claim to the employment tribunal that she was unfairly dismissed.
2. At the start of the case I clarified with the claimant that her claim was of unfair dismissal only. This is because the narrative on the claim form starts with the fact that she had been engaged in strike action, and also because she resigned immediately following refusal of her request for flexible working. She said that the strike action was only part of the timeline, and she did not consider it the reason why the respondent behaved as it did that led her to resign. She was not complaining either of any breach of her right to request flexible working. Her complaint was that the refusal was unreasonable. This meant the main issue for the employment tribunal to decide was whether the employer's conduct breached the contract so seriously as to entitle her to treat it as at an end, and whether there was unfairness in that.

Evidence

3. The tribunal heard evidence from the following witnesses:

10.2 Judgment - rule 61

Jasmin Ogbonna, the claimant

Christopher Simons, Head of School, who had overall responsibility for the forensic science department.

Kishan Narayan, HR manager

Philippa Cooke, Head of Hub (support services).

Mustafa Turus, The claimant's union representative, had prepared a very brief statement, but was not questioned by the respondent.

The claimant had no questions for Kishan Narayan and only two questions for Philippa Cook.

4. There was a documents bundle of 219 pages including the index.
5. The case had been listed for two days. The evidence and submissions concluded part-way through the afternoon of the first day, as the claimant's questions for the respondent's witnesses had been briefer than expected. After consulting the parties on staying for the second day to hear oral reasons, judgement was reserved

Findings of Fact

6. Having heard the evidence, the tribunal makes the following findings.
7. The respondent is a corporation incorporated as a private limited company by guarantee to run a chain of further education colleges.
8. The claimant started work at City and Islington College on 15th March 2010, working full time, but later moved to part time hours, 24.5 per week. For this she was paid £27,276 per annum.
9. The term of her contract as to hours of work had to be determined. The contract in the hearing bundle had been issued in March 2022, when the claimant was off sick, and had never been signed by her. The claimant said she had an earlier contract of employment, but she had not disclosed it, and did not know where to find it. It was not at first clear from her evidence whether she agreed or disagreed that her contract terms were the same as this written contract, which states that normal hours are 9:00 to 5:00 Monday to Friday. She said it had been "falsified", but did not say that it falsified the term on hours. She meant she had not signed it; she did not say whether the term in this contract differ from her earlier contract. She later agreed that she *could* be asked to work on any days between Monday and Friday, adding she was not able to work on Friday. The respondent's position is that normal working hours were nine to five from Monday to Friday, and part-timers would work between those hours by arrangement and as notified on the timetables. Part-timers were sent flexible working forms to fill in, so that their preferences could be accommodated when possible. Emails from the summer of 2021 suggest that this is what happened in the claimant's case. Having regard to what actually happened, the tribunal finds that by contract the claimant was

obliged to work hours between Monday and Friday 9:00 to 5:00, but that the respondent in practise did what it could to accommodate individual preference.

10. In 2020 the claimant took maternity leave, and returned to work in February 2021. To start with, she did not work on a Friday. At the end of the summer term in 2021, she discussed with her manager, Paula Massam, whether her needs had changed, and the claimant said she would like to keep her Fridays off, because the nursery had no availability on a Friday. She also asked for flexible start and finish times for picking up from nursery because of the distance from work to home. It was agreed that the timetables would be varied so that either she or her husband (who also worked at the college) could on any particular day start at 9:30am, instead of 9am, and one of them finish at 4pm, so that they could collect their child before nursery closed at 6pm. An e-mail the claimant sent on 7th September to Christopher Simons (who had to authorise timetable changes) shows that there had been a clash on Wednesday and Thursday of a particular week in the autumn term, when both parents had to start at 9:00 am, and timetable changes were made at short notice so that the claimant would now start at 9:30 on those days.
11. As will be seen, this accommodation prompted a colleague complaint.
12. Five days after the start of the autumn term, on 11 September, the Vice-Principal for Curriculum and Students received an e-mail from "Marie Walker". This is a pseudonym, no one by that name is employed by the respondent. The writer said she had no other option but to write as she was "a very frustrated member of your staff". Her complaint was all about the claimant. "For some time now the forensics department have been dealing with a very difficult member of staff, who has been allowed to get away with not marking assignments on time, behaving highly unprofessionally in front of students, unfortunately has no respect for her seniors and her peers alike". There had been recent changes to timetables. "One particular member of staff who is extremely difficult to deal with, is being allowed to behave in an abhorrent manner, that is dividing the team and is having a detrimental effect on student satisfaction". On Thursday 9th September she had altered the student timetables herself to ensure that she was able to start a lesson at 9:30am instead of 9 am as initially time tabled. Christopher Simons had been informed of this but had chosen to ignore it. The writer added that Jasmin: "leaves the building no later than 4:00 pm which means she has been allowed to cut her working hours by 1.5 hours a day, without a reduction in salary". This was said to be so she could collect her child from nursery, but three other working mums in the department did not use childcare as an excuse, and if she was to start at 9:30, she should be required to stay until 5:30. Another member of staff undergoing immunosuppressant treatment had had to alter hours to accommodate the claimant, which was unfair. On 8th September Jasmin had walked out of the team meeting at 4:00 pm stating that she had not got time to complete the schemes of work under discussion. The access to forensic science course moderation had been disrupted by the

claimant not doing the marking on time. The writer complained that Christopher Simons gave in to the claimant, who was “a bully”. He was scared of her threats to go to the union.

13. One response to this was that Paula Messam, the claimants line manager, sent her a “standards letter”, a standard format about issues relating to team meeting attendance and working contracted hours. She said that she had not attended an arranged team meeting, had left early without prior agreement, and had left the workplace early. Going forward she was to meet the standard of attending all team meetings, and being at the workplace in contracted hours and if allowed to start later, time was to be made up in the evening. She must engage in “open and honest dialogue”, and any special arrangements were to be agreed early and in advance. Failure to comply might in future lead to formal disciplinary action.
14. The claimant had been sent such letters in the past, in November 2014 about being late to class, and in September 2015 and September 2018, about inadequate assessment of learner work.
15. The other action taken by the respondent in response to the “Marie Walker” e-mail, was to consider whether there were other matters to be investigated beyond attendance - unprofessional behaviour and bullying. Between 10th and 17th October Christopher Simons spoke to three members of the 12 person forensic science team, whom he understood to be teachers working in the same field as the claimant, Rani, Risa and Jo. He read out to them passages from the Marie Walker e-mail and recorded their answers, then emailed these to them to check accuracy. He concluded that the allegations could not be dismissed as wholly spurious, and should be properly investigated.
16. The HR department asked Philippa Cooke to investigate. She wrote to the claimant on 20th October 2021 inviting her to an investigation meeting on the 4th November 2021. She said she was investigating “a potential gross misconduct/misconduct issue on inaccurate communication to learners, professional conduct, lessons not delivered in accordance with the timetable, and unauthorised reductions of course hours”.
17. Miss Cooke had never conducted an investigation before, and after consulting Mr Simons, asked him to assemble his researches for her, which she treated as a draft investigation report, but HR put her right and said that she had to interview the claimant first and then write a report. In fact the meeting on the 4th November 2021 was cancelled because Miss Cook was ill,. Then on 19th November 2021 the claimant began a prolonged period of absence through work stress.
18. Towards the end of November 2021 the claimant consulted her trade union about lodging a grievance about the investigation having stalled, but she did not do so.

19. The claimant was a member of UCU, and as a trade union member engaged in industrial action from the end of September 2021. She was on strike on 29 and 30th September 2021, 5th, 6th, 7th October, 11th, 12th, 13th, 14th, and 15th October. No other members of the claimants forensic science team went on strike. The “Marie Walker” e-mail predated any strike action.
20. The respondent has a sickness absence management policy, which provides a number of ‘review points’ which trigger stage 1 of the procedure. One of the review points is to be absent from work for six days in any three months. The procedure goes on to provide for more review points, leading to stage 2 and stage 3. At stage 3, dismissal is a potential outcome.
21. The respondent arranged for the claimant to have an occupational health assessment, which was done on 19th January 2022, and she was then invited to a stage 1 meeting on the 3rd of March 2022.
22. The occupational health report discusses the work issues impacting on the claimants health, in particular that they had built up following her return from maternity leave in February, when she had inadequate level of support with changes in working practice over the pandemic, increased staff turnover, no stress risk assessment, no return to work meeting, or any phased return to work. She had attended a stress management course. Of course this is but a summary of a two hour discussion, but it is of note that there is no mention of a pending disciplinary investigation, and the stress was related back to much earlier date.
23. The claimant also discussed stress at work at the meeting on the 3rd March 2022. She said that on her first day back from maternity leave the previous year she had had a panic attack. She was already on antidepressants at that point. Then in August 2021, when two classes were merging, she had been asked to teach chemistry and physics, when she was a social science specialist, and would be out of her depth. Then the strike had changed the mood in the office. She had got the letter from Philippa Cooke about investigation for misconduct just after returning from strike action, and soon after her husband was told his salary was being halved. “The day I walked out I was very angry”.
24. The claimant was asked at this meeting if there was anything that would help and she replied that she wanted to work three days, not four, to teach only subjects she specialised in, and she wanted the investigation to be carried out. She also wanted to move to a different office because she did not feel “appreciated or safe” with her colleagues. Her trade union representative added that the investigation should be terminated, as it was hanging over her head with no evidence.
25. Not mentioned at this meeting, or later, but relevant to childcare pressures, is

that the claimant's husband ceased to be employed by the respondent in December 2021. The claimant did not discuss this, but it must have made the earlier coordination of their flexible starts and finishes more difficult.

26. On 16th May the claimant asked for a meeting to discuss her return to work, which she expected to do on the 10th June. In order to return she wanted a permanent change of office, a reduction to three days a week, only teaching units she was familiar with, and a phased return because she was having an operation on her foot which would impair her mobility. She was sent a flexible working request form (as were all other staff at this planning stage for the next term's timetables), and she sent it back on the 19th May. On the form she asked for three days a week, not four, and for a late start and finish to accommodate childcare, and to teach only units 5-6 and seven of BTech and CJS, and in the Access course, introduction to criminology and introduction to psychology. She wanted to work on a different floor, which was "for everyone's benefit".
27. The claimant had a formal return to work meeting on 9th June. Paula Messam said that she was to teach on Friday in the next academic year, which was difficult because her husband worked that day, and arrived home late. She was also told she could not have another office. The claimant wrote to HR about this, complaining it was not fair when another member of staff had had Friday off for 12 years, and it had been unpleasant in the office ever since she had taken strike action and others stopped talking to her.
28. There was a formal response to the flexible working request on the 23rd June. A reduction to 0.6 full time hours (3 days) was agreed. Fixing those days to Monday Tuesday and Wednesday could not be agreed because there would be not enough coverage to timetable groups across the week. They would aim to accommodate her needs, but days might change due to business requirements. They could not agree a late start and early finish on a permanent basis, but it could be managed locally with the line manager. The needs of learners came first. As for the subjects she taught, they could accommodate her teaching units 5,6 and 7 the following academic year, but it might not be possible for the next year. The course design might change, and if it did, she would be given training to enable her to teach other units if required. She was reminded she had a right to appeal.
29. Next day, 24th June 2022, the claimant resigned. Her reasons were set out in eight bullet points. The first two were about the refusal of her flexible working request, in particular the requirement to work on Fridays. Next was that the college was ignoring the occupational health report about her mental well-being, and that she had started a phased return to work for work-related stress without first completing a stress management questionnaire. Next, "the college have chosen to place me back in a hostile office environment where I will be ostracised and which will further exacerbate my stress/anxiety levels". The sixth point was that the college "still expects me to teach subjects e.g. Physics and Chemistry which I have no knowledge or understanding of".

Having had to teach those in September 2021 had led to “stress induced gastritis, hair loss and other physical/psychological health problems which I'm still recovering from”. The seventh point was the “gross misconduct charge”, where no evidence had been forthcoming, and it was still dangling overhead, creating the fear that she could lose her job. Finally, she had been “subjected to a form of psychological harassment” and the college’s actions and inactions had broken her down mentally. She did not intend to appeal the flexible working decision because she believed it would be a futile exercise. She gave two months’ notice, and her last working day was the 6th July.

30. Kishan Narayan responded on behalf of the college confirming that the college could arrange an appeal hearing to review the flexible working decision. There would be an impartial appeal manager, so it would not be futile. She was also sent the grievance procedure in respect of the other matters. On misconduct, he said there was no charge of gross misconduct, and until there was a full investigation they were only allegations. Now that she was back at work they were able to investigate.

31. The claimant did not appeal or bring a grievance or wait for the investigation.

32. She has found another teaching post on 0.5 hours.

Relevant Law

33. As the claimant’s resigned immediately after her request for flexible working was refused, it is relevant to mention the statutory context of flexible working. Under the Employment Rights Act 1996, employees have a right to request a change in their terms and conditions of employment as to the hours, times or place of work. An employer must deal with this reasonably, and in a timely way, and can only refuse it on one of the grounds specified in section 80G, which relate to business needs. There is also a right to appeal an employer's decision, and to bring a claim to an employment tribunal about the employer’s handling. Although this part of the statute is headed “flexible working”, there is no right to flexible working, only a right to ask for it to be considered in the context of business need.

34. This is a case where the employee resigned and so must establish that in law this amounts to a dismissal. By section 95(1) of the Employment Rights Act 1996, a dismissal can occur where:

(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.

35. As made clear in **Western Excavating (ECC) Ltd v Sharp (1978) IRLR 27**, it is not enough that the employer’s conduct is unreasonable. It must amount to a fundamental breach of the contractual employment terms such that the employee can treat the contract as at an end by reason of the employer’s repudiatory conduct.

36. **Woods v WM Cars (Peterborough) Ltd (1981) IRLR 347**, upheld in the Court of Appeal, and approved by the House of Lords in **Malik v BCCI** makes clear there can be:

“implied in the contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract. The Industrial tribunal’s function is to look at the employer’s conduct as a whole and to determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it”.

37. Where there are a series of actions they can be looked at cumulatively. The precipitating cause may not be weighty of itself but prove to be the last straw – **Omilaju v Waltham Forest (2005) ICR 481**.
38. It must of course be shown that it was the fundamental breach of the contract terms that caused the employee to resign.

Discussion and Conclusion

39. The core question is whether the respondent acted in a way likely to damage the relationship of confidence and trust without reasonable and proper cause.
40. The occupational health report and the notice discussion at the stage 1 meeting identify that the claimant’s ill health went back to February 2021, at least, which is when pressure on her working hours began because of the need to collect the child from nursery. It can be seen that although the claimant was in theory required to work on a Friday, she never was, and when so timetabled in June, that was adjusted. The respondent, by Christopher Simons, also adjusted her timetable so that either she or her husband could leave early or late. Some of the complaint of “Marie Walker” was about the claimant adjusting her working hours without notice or consultation, and if this was true, that could also be related to the pressure of childcare.
41. The respondent generally had a policy of trying to accommodate particular working time needs, many of which were related to the care of young children, and largely achieved this, with the claimant and others. This general aim at flexibility, but without commitment, is apparent in the response to the flexible working request. She could discuss late starts or early finishes with her local manager, but they could not be guaranteed. Nor could she be guaranteed that she would not have to work on a Friday. The claimant suggested that if another employee could always have Friday off, so could she. Presumably that would mean the other employee would be required to work on a Friday, not that the respondent could accommodate both.
42. The claimant’s evidence only touched on what she was required to teach. It does not appear that she discussed this subject with her managers. This only

started in September 2021, so there cannot have been much of it, taking out strike days and bearing in mind that she went sick in mid-November. The tribunal was not able to assess whether respondent acted reasonably or unreasonably or how many sessions the claimant did or might have had to teach in Physics and Chemistry. What is clear is that she was told that at least for one further year she would not have to and she would get support after that. This appears to be a constructive and reasonable approach.

43. On moving to an office in another part of the building, the claimant's difficulty was hostility from her colleagues. The "Marie Walker" e-mail shows that this hostility preceded strike action and was related to her unilateral action on late starts and early finishes, when at least some of her colleagues seem to have thought Christopher Simons was too soft on her. The respondent did not deal with this in the response to the flexible working request. The claimant had been informed of this by Paula Messam, and protested about it, but does not seem to have waited for a reply. She could have explored this under the grievance procedure, formally or informally. If the respondent, for business reasons did not have another office for her, there could have been another solution, perhaps involving mediation. The claimant's case on this is simply that she had asked for it, hostility from colleagues was, according to the occupational health report, contributing to her mental ill-health, and she should have been given it. There were ways she could have explored it, in an appeal, or in a grievance, and until she had, it cannot be said that the respondent destroyed or seriously damaged the relationship of confidence and trust. On the contrary, she was reminded of her right to appeal and to use the grievance procedure.
44. That brings us to the pending misconduct investigation. The claimant challenged Christopher Simon's decision that the pseudonymous allegation merited investigation at all, but the employer's response was a reasonable one. Organisations cannot ignore all anonymous allegations on the basis that they are anonymous. They can only proceed with caution, bearing in mind that it might be untrue or malicious, or true and in fear of reprisal. Mr Simon's preliminary interviews suggested that the allegations could not be dismissed as baseless without a full investigation. It is unfortunate that the preliminary interview with the claimant was delayed because Ms Cooke was uncertain of what to do, and unfortunate that she was too ill on the day, and that no further date had been set before the claimant went sick two weeks later. The respondent then faced the dilemma of postponing the investigation with the claimant until she returned to work, without knowing when that was, or whether they should suggest a meeting while she was off sick. It is a pity that an investigation interview does not appear to have been considered when the claimant indicated in May that she would be returning in June.
45. The claimant wanted the respondent to abandon the investigation. A pending misconduct investigation is difficult for any employee, even those not already suffering mental ill-health. It cannot however be said that the respondent did not have "reasonable and proper cause" to investigate an allegation of

bullying, which, insofar as the detail could be checked on a preliminary sift, could have some credibility. Much damage to staff and to organisations can be caused when employers fail to investigate allegations of bullying. It is a problem which rarely goes away

46. The tribunal concludes therefore that although from the claimant's point of view she could not have confidence in the employer because they would not give her what she asked for, the respondent did not act in a way that would damage the duty of mutual confidence and trust. They always accommodated staff requests where possible, and had accommodated the claimant. They had conceded that she need not teach Physics and Chemistry for at least another year. The reasons given for not committing to particular days and hours make business sense, when many learners were themselves part-time. There was nothing to show the claimant was treated differently to other staff on this. Faced with an allegation of bullying that could not be dismissed immediately, they had to investigate it. That it took so long is unfortunate, but understandable in these circumstances, and should have been understood by the claimant, and so not a breach in the duty of mutual confidence and trust. It was one factor in her mental state, This was not of such significance that it was noted by the occupational health adviser. It was one of the cumulative factors leading to the resignation, but the respondent's conduct was not a breach of the duty of mutual confidence and trust. The respondent followed its own procedures, treated the claimant with courtesy and consideration, and invited her to reconsider. This was all action that promoted confidence, not undermined it.
47. The claimants resignation is not therefore a dismissal within the meaning of section 95(1)(c). The unfair dismissal claim does not succeed.

Employment Judge Goodman
20 April 2023

JUDGMENT AND REASONS SENT to the PARTIES ON

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20/04/2023

FOR THE TRIBUNAL OFFICE