



# EMPLOYMENT TRIBUNALS

**Claimant:** Sandra Boswell

**Respondent:** Disco Bowl Nuneaton Ltd

**Heard at:** Birmingham

**On:** 18<sup>th</sup>,19<sup>th</sup> February 2021

**Before:** Employment Judge Steward

## **Representation**

Claimant: Mr M Anastasiades Solicitor

Respondent: Ms Walker (HR)

# JUDGMENT

The decision of the Tribunal is:

1. The claim of constructive unfair dismissal succeeds.
2. There will be a remedy hearing and orders for that will be made separately

# REASONS

## **Introduction**

1. The Claimant was employed by the respondent as a General Manager at Disco Bowl Ltd between the 1.7.2010 and the 29.12.2019.
2. The Claimant claims constructive dismissal and relies on an allegation that the Respondent breached the implied trust and confidence term which is contained in every employment contract (“the implied term”). The Claimant relies on a course of conduct carried out by the Respondent which taken together she says amounted to a breach of the implied term.
3. The matters that the Claimant relies on to show a breach of the implied term were set out in detail in her ET1 Claim Form and details of claim statement. The Claimant relies on a series of events starting from when she was given a written

warning on the 25th October 2019 in the letter sent to her by Belinda Walker regarding alleged discrepancies in GP (Gross Profit) and the cash and banking investigation which led to her suspension on the 23rd November 2019 in a further letter sent to her by Belinda Walker. She relies on the way the Respondents dealt with the investigation generally. She will say that she was unfairly treated at the meeting on the 26th November 2019. Her explanations were disregarded at this meeting as she was invited to attend a disciplinary meeting on the 3rd December 2019.

4. The Claimant says she lost all trust and confidence in the Respondents when she received the letter formally requesting her to attend the disciplinary hearing. This was effectively the 'last straw' She was signed off work with anxiety and stress until the 29th December 2019. She did not return to work. She resigned in her letter of the 29th December 2019 stating that the 'build up and handling' of her case had been 'underhanded and despicable'. She did not believe she would receive a fair hearing on the 3rd December and believed the Respondents wanted to get rid of her.

5. The Claimant was represented by Mr Anastasiades and she gave live evidence along with Mr K Barnes and Mr D Stone. The Respondent appeared in person but their case was conducted by Ms Belinda Walker (HR) who gave live evidence along Mr Peter Terry. The bundle consisted of 86 pages of evidence. The hearing was conducted entirely remote by Cloud Video Platform

### **Summary of the law to be applied to the constructive dismissal claim**

1. The fundamental questions which I must ask myself have been settled since the case of Western Excavating Ltd v Sharp [1978] 1 All ER 713. They are as follows:
  - i. Did the Respondent breach a fundamental term of the contract?
  - ii. Did the Claimant resign in response to the breach?
  - iii. Did the Claimant delay too long before resigning, thereby affirming the contract?

1. In this case the Claimant relies on an allegation that the Respondent breached the implied term of trust and confidence. The concept of the duty of trust and confidence was clearly set out in Mahmud v Bank of Credit and Commerce International SA [1997] IRLR 462. The contractual term was described there as follows: "The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee".

2. More recent case law has clarified that it is not necessary for the employer to act in a way which is both calculated and likely to destroy the relationship of trust and confidence, instead either requirement need only be satisfied – see Baldwin v Brighton & Hove City Council [2007] IRLR 232.

3. The Claimant argues that there was a series of acts making up the breach of the implied term. The question for the tribunal will therefore be “does the cumulative series of acts taken together amount to a breach of the implied term?” (Lewis v Motorworld Garages Ltd [1985] IRLR 465, per Glidewell LJ).

4. In cases where a series of acts is relied upon the tribunal must consider the “last straw” which caused the Claimant to resign. The last straw must not be an innocuous act – it must be something which goes towards the breach of the implied term (see London Borough of Waltham Forest v Omilaju [2005] ICR 481).

5. Tying together the case law identified above the Court of Appeal in Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978 clarified the approach to be taken by the tribunal as follows:

*In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions: (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation? (2) Has he or she affirmed the contract since that act? (3) If not, was that act (or omission) by itself a repudiatory breach of contract? (4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation....) (5) Did the employee resign in response (or partly in response) to that breach?*

### **Summary of the law considering the potential effect of suspension on breach of the implied term**

1. From at least the case of Gogay v Hertfordshire County Council 2000 IRLR 703, CA, it has been recognized that there should be ‘reasonable and proper cause’ for an employer to suspend an employee. If there is not and the suspension was in effect a ‘knee-jerk reaction’ then the employer may well have acted in breach of the implied term.

2. The Court of Appeal reiterated the approach in Gogay in Crawford and anor v Suffolk Mental Health Partnership NHS Trust 2012 IRLR 402, CA. The Court in that case warned employers against automatically imposing suspension in response to even very serious allegations and pointed out that employees frequently feel belittled and demoralised by their exclusion from work.

3. In London Borough of Lambeth v Agoreyo 2019 IRLR 560, CA, the Court of Appeal again found that the only relevant question in each case is whether the employer had reasonable and proper cause to suspend the employee, not whether the suspension was necessary. The Court of Appeal also observed that each case had to be decided on its own facts and that consideration of whether suspension was a ‘neutral act’ was unlikely to assist.

4. Accordingly, suspension in the absence of a contractual right to suspend will not inevitably lead to the conclusion that trust and confidence has been breached.

5. Instead it seems to me to be clear that what matters instead is whether the employer is able to show a reasonable and proper rationale as to why it was appropriate to suspend rather than follow other options, and that the absence of such

evidence would suggest that the suspension was simply an automatic knee-jerk reaction. A knee jerk suspension in that sense may well mean that the employer has acted in breach of the implied term.

## **Findings of Fact**

6. In this section I will record findings of fact and also any findings to the effect that there has been conduct going to the breach of the implied term.
7. The Claimant states in her ET1 that she had been employed by the Respondents since the 1.7.2010 until the date she resigned on the 29th December 2019. In her unchallenged evidence on this point she stated that she started work in 2010 with the company Lakeside Super Bowl. She began as a duty manager. She became a manager in approx 2014. She stated that Lakeside were taken over by MFA in 2015. Her duties did not change. Thereafter MFA were taken over by Disco Bowl. The Respondents accepted that the Claimant had continuous employment with them as she claimed since 1.7.2010. Therefore her period of employment was from the 1.7.2010 until the 29.12.2019 when she formally resigned. The Claimant gave clear and unchallenged evidence on these points and I accept this evidence.
8. The Claimant had no disciplinary issues recorded against her until she received a written warning by way of a letter dated the 25th October 2019. I heard evidence from the Claimant that she had enjoyed her job over the years and had no intention of leaving. I accept this evidence.
9. The written warning she received on the 25th October 2019 requires further consideration not least in that she says this was the start of a 'calculated attempt' to remove her from her employment. It is an undisputed fact that the Claimant received a letter from Belinda Walker (HR Advisor) dated the 25th October 2019. The issue was a drop in GP (Gross Profit) this followed an audit on the 17th October 2019. This confirmed that the profit was significantly down to 63.8% rather than the expected 70%. The Claimant was advised on the 19th October 2019 that this needed to be rectified immediately. A meeting was held with Mr Terry on the 22nd October 2019 and it was made clear that unless the GP was 70% by the next audit on the 24th October 2019 a warning would be put on the file. The GP was 66.2% at the audit on the 24th October 2019 and a written warning was placed on the Claimants file.
10. I heard a lot of evidence about this procedure and the suggestion that it was unfair to expect a return to 70% GP in the 2 days the Claimant appeared to have between the 22nd October and the audit on the 24th October. When she was cross examined on these points Belinda Walkers evidence was unclear. She suggested that the Claimant had probably been spoken to about this the previous week and as she was the manager she should have managed it in any event? The suggestion she would have been spoken to about it in advance was an assumption. There was no evidence in the bundle that she had. Belinda Walker also stated that the Claimant would have had a 2 week period to resolve the issue with the GP. When the dates in the letter of the 25th October were pointed out to her and the timeline for improving the GP she accepted that the Claimant had been given a period of 2 days to resolve the GP or face a written warning. Belinda Walker accepted the 2 day

period from the 22.10.2019 to the 24.10.2019 was an unreasonable period to resolve the issue of the GP.

11. Mr Terry when cross examined on this point stated that a possible reason for the low GP was stock going missing. He also said that an email had been sent to the Claimant on the 19th October 2019 from him asking her why the GP was low. It suggested a 'lack of control'. The email of the 19th October was never produced or disclosed and was not referred to by Belinda Walker. Mr Terry stated they operated a 'wackamole' policy on this issue. They needed to see what the problem was and resolve it quickly. Stock was an asset and staff had a habit of giving it away and being sloppy with it. Mr Terry accepted there was no right to appeal the written warning in the letter of the 25th October 2019.

12. I find that the Claimant was only given 2 days to resolve the issue over the low GP before she was going to get a written warning. As confirmed by Belinda Walker, in my view this was an incident that could have destroyed or seriously damaged the relationship the Respondents acting without a reasonable and proper cause. The Claimant had over 9 years working for the Respondent and an unblemished record before this issue. It was clear from the evidence that the low GP could be low for various reasons. The 'wackamole' approach, namely to find out what the issue was and deal with it as quickly as possible is understandable. However, to afford the Claimant 2 days to resolve it was in my view an example of the respondents acting without reasonable and proper cause conducting itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. On this point I accepted the evidence of the Claimant. I found the respondents evidence contradictory and unconvincing.

13. The Claimant has suggested this was the start of a concerted effort by the Respondent to get rid of her. It was the first in a series of issues which led to her losing trust and confidence with the Respondent. It is clear that this issue would have damaged her trust and confidence with the Respondent but to what extent it was start of a concerted effort to remove the Claimant from her employment needs to be considered in the context of all the other evidence.

14. Mark Cox relocated to Disco Bowl Nuneaton in October to assist the Claimant. As a result of concerns surrounding his performance, in particular safe errors and banking procedure, he was invited to an investigatory meeting on the 17th November to be dealt with by the Claimant. He was not suspended. That meeting took place and Mark Cox explained the errors were due to fatigue. As a result of this meeting Mark Cox was invited to a disciplinary meeting on the 22nd November 2019. The issues to be discussed at the hearing were cash management and banking procedure. Though Mark Cox was now subject to a disciplinary meeting he was not suspended. When Belinda Walker was asked by the Tribunal whether the issues that Mark Cox was under investigation for were more or less serious than the issues the Claimant ultimately faced Belinda Walker said they were more serious. In the Respondents ET3 they stated that 'improper action regarding cash and banking are of a serious nature and the decision was made to suspend the Claimant'. However, it would appear that no action was ever taken against Mark Cox for equally serious issues over cash and banking.

15. The Disciplinary meeting with Mark Cox took place on the 22nd November 2019. Scot Miles an independent auditor undertook this meeting. We do not know what

was discussed at this meeting. The tribunal has never seen any notes or record of this meeting. However, what is clear is that the focus of any investigation must have turned towards the Claimant. It would appear that as result of Scot Miles discussion with Mark Cox and his own audit the Claimant was written to on the 23rd November 2019. In this letter she was told she had to attend a meeting with Scot Miles on the 26th November 2019. It's unclear why Scot Miles was undertaking an investigatory role as he was an independent auditor. The Claimant was informed that three matters would be discussed.

- a. 3 x till floats being singed off by her on the 21.11.19 as balancing when they did not.
  - b. A refund packet in the safe marked as £30.90 with only 90p in the packet.
  - c. Your instruction to staff to sell £1.95 soft drinks for £1.50 to league bowlers by ringing in cordial x3 instead of using the correct button.
16. She was also sent a statement completed by Peter Terry regarding a conversation he had had with Theresa Spicknell a former employee which took place on the 22.11.2019, the same day of the disciplinary meeting with Mark Cox. Miss Spicknell's statement was a critique of the Claimant. It was suggested that the discussion with Ms Spicknell was part of the exit interview process. I had also heard evidence from the Claimant that she had conducted that interview on the 14th or 15th November and that Mr Terry was not conducting an exit interview but gathering evidence as part of the campaign to remove the Claimant. Mr Terry said he spoke to Ms Spicknell on this day as she wanted to speak to him and he wanted to find out why she had left for no apparent reason. The dates and the timings being a complete coincidence. I accept that Mr Terry was speaking to Ms Spicknell for the reasons that he explained.
17. The letter to the Claimant also informed her that she was now suspended from work while the investigation was carried out. The Respondents said was not as a punitive measure but to protect both the claimant and the site and to ensure that the investigation was fair. The letter went on to say that disciplinary action could be taken which may also result in the termination of the claimant's contract.
18. I find that the Claimant was treated very differently from Mark Cox over very similar issues. She had worked for the company for many years with virtually a clear disciplinary record. She had been suspended as a result of information that could only at that point have come from Mark Cox who was a new member of staff. The decision to suspend the Claimant was made before Mr Terry spoke to Theresa Spicknell as per his own evidence. I find that the Claimant would have been upset by the decision to suspend her without discussing the issues with her first. The conduct of the Respondent to suspend in such circumstances was an example of the respondents acting without reasonable and proper cause and conducting itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. However, no action was taken against Mark Cox and the claimant did not know what Mark Cox had specifically said about her in his interview on the 22nd November 2019. That information was never fully disclosed to the Claimant. No record of it exists. That in itself would have further damaged the trust and confidence she had in the Respondent. The fact that the statement of Theresa Spicknell was obtained on the same day as the interview of Mark Cox and was obtained by Peter Terry would from her perspective further erode the trust and confidence she had in the Respondents. Its understandable why she

may have felt this was an evidence gathering exercise but I do not make that finding. The Claimant was also aware that her suspension could also lead to the termination of her employment with the Respondents in the same letter.

19. The Claimant attended the meeting with Scot Miles on the 26th November and a record of the discussion was included in the bundle. Further information was obtained to be put to the Claimant from a former employee and a current employee. This information was anonymous. In relation to the 3 x tills the Claimant said at the meeting she had signed for £100 in each till and the float added up to £100. It was suggested that 2 tills were both £1 short and one till was £2 over. Therefore regardless of whether or not the tills/floats did or did not balance the correct amount of money was present?
20. In her oral evidence on this point Belinda Walker accepted that the correct amount of money was present. There had been no theft. Miss Walker accepted there had been 'small discrepancies' in 3 tills. She also said this was a 'procedural issue' not theft. Miss Walker said that the procedure on this issue was 'quite complicated' and this procedure had been sent out in August 2019. However this procedure was not included in the written evidence and the Respondents could not pin point exactly what procedure she had failed to comply with?
21. The Claimant gave an explanation regarding the packet of £30.90 in the safe that only had 90p in it. She was asked at the meeting 'any idea why the money isn't there?' It was conceded by Belinda Walker that this issue was not the reason for her suspension and would not have gone any further towards the disciplinary. However this was never made clear to the Claimant and only became apparent when Belinda Walker was asked questions on the point during the evidence. The claimant was also able to give a full explanation for cordial sales at £1.50 and the issue of the ringing of the cordial x 3. She was asked various questions regarding the detail of the conversation between Theresa Spicknell and Peter Terry the content of which she denied. She was also asked why the Scobby-Do Machine only had a £20 balance rather than a £120 balance. It was conceded by Peter Terry when he was cross examined that this issue was a simple mistake. Peter Terry said £120 was missing without an explanation. However the paperwork was incorrect and the machine had changed from 2p to 10p. This allegation was subsequently withdrawn even though I was unclear what the original compliant was in any event?
22. In his written evidence Peter Terry said at paragraph 7 page 85 that as a result of the interview with the Claimant and supporting statements he felt that 'some misconduct had taken place but wanted to go through the findings and evidence again with Sandra to come to a fair and reasonable conclusion'. In his oral evidence to the Tribunal he said 'clear there was misconduct by somebody and had to get to the bottom of it' and when it was put to him that Belinda Walker felt it was a procedural issue he said 'there was some misconduct somewhere in the business but not necessarily by Sandra Boswell'. He made reference for the first time to problems with an audit in April 2019 and wanted to dig deeper. I preferred the evidence of the claimant on these issues. She had given clear explanations.
23. I find that the investigation was not well managed and was unclear in what it sought to establish. On the one hand the Respondent said the issues were 'procedural' while on the other hand it was felt 'some misconduct' had taken place. Some misconduct somewhere but not necessarily the Claimant. The Claimant was

criticised for not performing on particular procedures which were never put to her in interview or provided for the tribunal.

24. The issue over the £30 missing from the packet in the safe was not an issue that led to suspension. It was a matter that was withdrawn but was not clear why? Likewise the issue over the Scooby-Do pusher was discussed on the 26th November 2019 and the comments of Alex Hamilton on the 30th November made reference to this issue again. Peter Terry made reference to the fact that he had further questions to ask about the reduced price drinks and the coin pusher (Scooby-Do Machine). The missing £30 was not a matter which led to suspension and was not going further to the disciplinary hearing on the 3rd December 2019. The issue over the Scooby-Do machine transpired to be an error. The Claimant was informed on the 27th November 2019 that she would have a disciplinary hearing on the 3rd December 2019. This would be chaired by Peter Terry who was already involved in the investigation having spoken to Theresa Spicknell on the 22nd November 2019. Alex Hamilton in his meeting with Scot Miles on the 30th November 2019 stated that he did not make mistakes with money which was an apparent contradiction as he had signed off a float which had a £21 surplus and he was 'mortified'. However he was never subjected to any investigation or disciplinary action.
25. From the 26th November to the 3rd December 2019 the Claimant would remain suspended. The Respondents made it clear they were seeking further evidence. When giving evidence Belinda Walker stated that the reason for the continuing suspension was to protect the investigation and the identity of the people who were involved. However it was pointed out to her by the tribunal that virtually all the witnesses were anonymous and Miss Walker then suggested the suspension was to 'protect her from gossip' I do not accept the evidence of the respondent on this issue. The suspension was unlikely to protect the investigation any more than if the Claimant was still at work but perhaps in a different role or under supervision. To suspend to protect her from gossip was not sufficient reason.
26. I find that the decision to suspend the Claimant was an example of the respondent acting without reasonable and proper cause and acting in a manner which was likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. The allegations raised in the letter of the 23rd November 2019 were not the most serious and in my view were not matters of gross misconduct given the nature of the complaints and the sums involved. The decision to suspend the Claimant at that point was a knee jerk reaction which seemed to be largely based on the interview of Mark Cox conducted by Scot Miles on the 22nd November 2019. Consequently the decision to suspend a senior employee in such circumstances was belittling for her. At no time was she offered an alternative role, re training or supervision of her duties. The decision to suspend her was a matter which contributed to the breach of the implied term.
27. The Claimant stated she could not face the prospect of the disciplinary hearing on the 3rd December 2019 and believed the Respondents had made their minds up to dismiss her. She obtained medical evidence and was signed off until the 29th December 2019 when she then resigned. The fact she faced the prospect of a disciplinary hearing to be conducted by Mr Terry who had been involved in the investigation by taking a statement from Ms Spicknell was the 'last straw' for the Claimant. This was another incident which went towards the breach of the implied term.



28. I heard evidence from Mr Barnes and Mr Stone. They provided a statement each and live evidence with regard to the manner of their own alleged treatment and eventual exit from the company. Though they were clearly trying to assist and were called to show a 'course of conduct' which was similar to that of the Claimant I did not attach any weight to their evidence in determining this case.

### **Conclusions on Constructive Dismissal**

28. As will be apparent from the above, I have found that the Respondent did through a cumulative series of actions breach the implied term of trust and confidence in the Claimants employment contract

29. In summary the following matters I found went towards the breach of the implied term were

- a. The decision to suspend the Claimant. There was no procedure provided by the Respondents which set out the circumstances where suspension would be considered. The decision to suspend the Claimant was made without reasonable and proper cause. It was not a last resort act but was instead a knee jerk reaction based on very little if indeed any substantive evidence. No alternative routes were considered such as supervision, re training or different duties. Indeed the Respondent took the decision to suspend the Claimant before they even spoke to her. There was no review of the suspension. She was a senior employee who had many years of exemplary service.
- b. The circumstances of the written warning on the 25th October 2019. The decision to only allow the Claimant 2 days to resolve the issues with GP was unreasonable.
- c. The fact that Mark Cox was not disciplined at all for similar, if not more concerning breaches than the Claimant.
- d. The fact the Claimant was suspended as a result of the meeting between Scot Miles and Mark Cox on the 22nd November 2019. The details of this meeting and the issues discussed were never made available to the Claimant.
- e. The fact that Theresa Spicknell's statement was taken by Peter Terry on the 22nd November 2019. The same day as the meeting between Scot Miles and Peter Terry.
- f. The way the investigation was carried out. Belinda Walker describing the issues as 'procedural' while Peter Terry described 'misconduct', 'misconduct somewhere by somebody not necessarily the Claimant'. The lack of clarity with regard to what procedures the Claimant had broken? The lack of clarity with regard to what issues formed part of the reason to suspend and the disciplinary hearing on the 3rd December 2019
- g. The Claimant being treated differently to other employees who had admitted breaches such a Mark Cox and Alex Hamilton.

- h. The day after her meeting on the 26th November 2019 she received a letter dated the 27th November 2019 asking her to attend a disciplinary on the 3rd December 2019.
  - i. The fact that Peter Terry was going to conduct that disciplinary hearing on the 3rd December 2019 after he had been involved in speaking to and gathering evidence from Theresa Spicknell on the 22nd November 2019.
30. In my view the conduct summarised above the Respondent acted without reasonable and proper cause and conducted itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. We find that the respondent did not have reasonable and proper cause to conduct itself in any of the ways we have summarised above. I do not make any finding that the Respondents acted in way which was calculated to destroy the relationship of trust and confidence.
31. I find that the decision to move to the disciplinary hearing on the 3rd December 2019 which was to be conducted by Peer Terry was the 'last straw' in the course of conduct as summarised above.
32. I find that the Claimant resigned as a result of the breach of the implied term. This was made clear in her resignation letter.
33. I have considered whether the Claimant affirmed the contract. I find that she did not. She was signed off sick on the 3rd December 2019 and resigned on the 29th December 2019. Nothing occurred during that period which could be said to constitute an affirmation of the contract.
34. I find that the Respondent has not shown any potentially fair reason for dismissal. No real evidence or argument has been presented to that effect.
35. I therefore find that the claim of constructive dismissal succeeds.

Employment Judge **Employment Judge Steward**

Date: 25/02/2021