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# EMPLOYMENT TRIBUNALS

**Claimant:** Ms O Jegede

**Respondent:** Clear Architects Ltd

**Heard at:** East London Hearing Centre      **On:** 9-10 August 2018

**Before:** Employment Judge Ferguson (sitting alone)

## Representation

**Claimant:** In person

**Respondent:** Mr W Lane (Solicitor)

## RESERVED JUDGMENT

It is the judgment of the Tribunal that the Claimant's claims are dismissed.

## REASONS

### INTRODUCTION

1. By an ET1 presented on 15 February 2018, following a period of early conciliation from 20 December 2017 to 24 January 2018, the Claimant brought a claim for unfair dismissal, wrongful dismissal and breach of contract against the Respondent. The Respondent defended the claim. In essence the Claimant claims that she was bullied by a manager, Ms Kasim, over a period of more than 18 months, forcing her to resign in September 2017.

2. The issues to be determined were agreed at the start of the hearing as follows.

#### Constructive unfair dismissal

3. Did the following acts/ omissions occur?

3.1 In or around February 2016 Ms Kasim shouted at the Claimant in a meeting

room for the Claimant taking her lunch outside of prescribed lunch hours, despite being aware that the Claimant worked through her usual lunch hours to complete work on the Chigwell Project at Ms Kasim's request.

3.2 In or around May 2016 Ms Kasim set the Claimant up to fail by refusing to give the Claimant additional assistance to help complete a project deadline on the Woodford Project as requested, and thereafter unfairly criticised the Claimant for alleged bad time management.

3.3 In or around May 2016, on the Chigwell project, Ms Kasim put the Claimant on the spot and repeatedly criticised her in front of the whole office, and continued doing so until the Claimant ran into the toilets in tears.

3.4 In or around June 2016 on the Chigwell project, Ms Kasim criticised the Claimant for providing an alternative option to work she had set for the Claimant to carry out in her absence. When the Claimant tried to explain why she had provided the second option, Ms Kasim snatched the piece of paper the Claimant was referring to out of her hands.

3.5 Around the end of August to mid-September 2017, on the Woodford project, Ms Kasim repeatedly berated the Claimant in front of her colleagues and told her that she was causing the project to become unprofitable.

3.6 Subsequently, as the Woodford project increased in complexity, Ms Kasim's criticism became more frequent and aggressive. Ms Kasim insisted that she needed to micromanage the Claimant, and that she was to report to her every day.

3.7 In at least two Monday morning weekly team meetings in August 2017 Ms Kasim embarrassed the Claimant and put her down in front of Ms Clear, Mr Mors and her peers when she announced, without warning to the Claimant, that due to 'mismanagement' of the project she would be taking control of the Woodford project from the Claimant.

3.8 Sometime in August 2017, Ms Kasim told the Claimant that she couldn't help her any more than she already had, when the Claimant asked for help and clarity on how to get the project back on track.

3.9 In September 2017, Ms Kasim told the Claimant that the situation with her job had gotten very serious now and that if she didn't see some visible improvement then the Respondent and the Claimant may have to part ways, and the Claimant would no longer be working as the Respondent's employee.

4. The Claimant claims that she resigned in response to the last of those acts. The Respondent does not argue that the Claimant affirmed the contract after that act.

5. Was the act at paragraph 3.9 above by itself a repudiatory breach of contract? The Claimant claims that it breached the implied term of mutual trust and confidence and/or was a serious breach of health and safety.

6. If not, was it nevertheless capable of amounting to a “last straw”? If so, was it part of a course of conduct comprising several or all of the acts and omissions set out at paragraph 3 above which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence and/or health and safety?

7. If so, did the Claimant resign in response to the breach?

8. If the Tribunal finds that the Claimant has been constructively dismissed, the Respondent does not argue that the dismissal was fair.

Wrongful dismissal/ breach of contract

9. This complaint is essentially a claim for notice pay, but the legal basis for it was not clear. The Claimant’s notice period was one month. She resigned on 22 September 2017 giving one month’s notice, but on that date agreed with the Respondent that she would be paid until 6 October 2017, but would only work until 29 September. The Claimant claims that she only agreed to this because the Respondent threatened to enforce clause 18.2 of her contract, which amounts to a penalty clause and is unenforceable. She claims that she is entitled to be paid for the additional two weeks’ notice.

10. I heard evidence from the Claimant. On behalf of the Respondent I heard from Melanie Clear, Alexa Kasim and James Mors.

**THE LAW**

11. Section 95(1)(c) of the ERA provides:

**95 Circumstances in which an employee is dismissed**

(1) 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.

Dismissals pursuant to section 95(1)(c) are known as constructive dismissals.

12. Four conditions must be met in order for an employee to establish that he or she has been constructively dismissed:

- 12.1 There must be a breach of contract by the employer. This may be either an actual or anticipatory breach.
- 12.2 The breach must be repudiatory, i.e. a fundamental breach of the contract which entitles the employee to treat the contract as terminated.
- 12.3 The employee must leave in response to the breach.
- 12.4 The employee must not delay too long before resigning, otherwise he or she may be deemed to have affirmed the contract.

(*Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221; *WE Cox Toner (International) Ltd v Crook* [1981] ICR 823)

13. An employer owes an implied duty of trust and confidence to its employees. The terms of the duty were set out by the House of Lords in *Mahmud v Bank of Credit and Commerce International SA* [1997] ICR 606 and clarified in subsequent case-law as follows:

“The employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.”

Any breach of this term is necessarily fundamental and entitles an employee to resign in response to it (*Morrow v Safeway Stores Ltd* [2002] IRLR 9).

14. Where an alleged breach of the implied obligation of trust and confidence consists of a series of acts on the part of the employer, the tribunal should consider whether the final act which led the employee to resign is capable of amounting to a “last straw”. It might not always be unreasonable, still less blameworthy, but its essential quality is that it is an act in a series whose cumulative effect was to amount to a breach of the implied term. It must not be utterly trivial and an entirely innocuous act on the part of the employer cannot be a final straw even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in the employer. (*Omilaju v Waltham Forest LBC* [2005] ICR 481).

15. *Omilaju* was affirmed in *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 978. In the latter case Underhill LJ held at paragraph 55:

“I am concerned that the foregoing paragraphs [summarising the authorities on ‘last straw’] may make the law in this area seem complicated and full of traps for the unwary. I do not believe that that is so. 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?

## FACTS

16. The Respondent is a small architectural practice with approximately 10 employees in total. At all relevant times its leadership team consisted of its managing director Melanie Clear, together with James Mors and Alexa Kasim. The Claimant commenced employment with the Respondent from 14 September 2015, initially as an Architectural Assistant. At that time she was an architectural student undertaking her Part 3 studies. She obtained her final qualification on 26 October 2016 and was registered as an architect with the Architects Registration Board (“ARB”) on 20 December 2016. The Claimant’s job title was changed to “Architect” with effect from 1 January 2017, with an increased salary of £28,500.

17. It is worth noting that once registered with the ARB, an architect can set up in practice on his or her own.

18. Clause 18.2 of the Claimant’s contract provides:

“If you succeed in completion of your professional study; you commit to stay with the Company 12 months post qualification. Should you leave before the end of this term we reserve the right to ask for 50% of the agency fee paid to secure your employment.”

19. The contract also provides for one month’s notice by either party to terminate the contract.

20. Before signing the contract the Claimant raised a concern about clause 18.2. Ms Clear emailed the Claimant explaining that this was “to safeguard our position as a small practice who invest in people”. She also said, “should anything outside the studio influence your time with us like a family emergency then of course this would not be enforced.” The Claimant’s evidence was that she and Ms Clear had a telephone conversation after this, during which Ms Clear said that the agency costs were “minimal”. Ms Clear does not remember the conversation, but does not dispute the Claimant’s evidence. It is agreed that the Claimant was never told, until after she had resigned, that the agency fee was £3,900.

21. In light of my conclusions below it is unnecessary to make detailed factual findings on all of the allegations relied upon by the Claimant as contributing to the alleged fundamental breach of contract. The following overview is sufficient.

22. Mr Mors was assigned as the Claimant’s mentor for her Part 3 studies, but the Claimant was managed by all three members of the leadership team, depending on the projects to which she was assigned.

23. Two of the projects the Claimant worked on, Woodford and Chigwell, were managed by Ms Kasim. The Respondent accepts that the Claimant and Ms Kasim had “challenging moments” when working together. Ms Kasim’s style of management was to allow more junior members of staff a degree of autonomy, believing that they needed to learn how to make decisions for themselves if they were to practise as

architects. The Claimant's evidence was that she preferred the more "directional" style of management of Mr Mors. During 2016 Ms Kasim expressed frustration or disappointment with the Claimant's work on a number of occasions. Ms Kasim acknowledged in her evidence that she is often very "to the point", especially when under pressure.

24. The Claimant had a number of one-to-one review meetings with Ms Clear in 2017. It is common ground that at each meeting the Claimant was praised for certain aspects of her performance, but was also told that there were areas that needed improvement. Notes of such a meeting on 17 August 2017 state "Accuracy again rearing its head – in an much as not thinking – Sun no doors to get in..." and under the heading "Development" accuracy was again mentioned as well as "Tone on the emails". The document concludes: "Definite improvement and keep going want to see more! Focusing on the above areas and we can discuss again in Nov."

25. By this time, August 2017, the Claimant had been put in charge of the Woodford Project, under the supervision of Ms Kasim. In mid to late August Ms Kasim became concerned about the Claimant's performance, prompted by her handling of a particular issue with the client. In essence, the client was annoyed about some unexpected work that needed to be done. The Claimant drafted an email to the client which focused on the practice's role in the work not having been done sooner. Ms Kasim substantially redrafted the email to minimise any blame that could be attached to the Respondent. After the email was sent out, the client telephoned the Claimant. Ms Kasim overheard the call and was concerned that the Claimant was again admitting fault on the part of the practice, so she took over the call.

26. Ms Kasim reported her concerns to the leadership team and it was agreed that she would take over responsibility for the project. The Claimant would continue to work on the project, reporting daily to Ms Kasim. The Claimant accepted in cross-examination that it was a reasonable management decision to put these steps in place.

27. On 1 September 2017 Ms Kasim sent an email to Jo Deadman, a consultant engaged by the Respondent to assist with staff issues, asking for advice on how better to engage with the Claimant, to prevent her from "rambling". She said, "I don't want to have to constantly be short with her or tell her to get the point". Ms Deadman replied on the same day with detailed advice on the types of phrases Ms Kasim could use to encourage the Claimant to get the point.

28. It is worth noting that the Respondent consulted with Ms Deadman regularly and her work included undertaking "predictive index" surveys on all staff, to inform management on how different personalities interact in the workplace. Ms Deadman also ran a team building day in October 2016, when the personality traits of staff members were discussed and advice given on how to work with each other.

29. On 6 September 2017 the management team had a discussion about the Claimant. They agreed that Ms Kasim would talk to her and explain that her performance would be monitored over the following two weeks. If it did not improve, they would have a further meeting to consider a formal performance improvement plan. The Claimant accepted in cross-examination that both Ms Clear and Ms Kasim had genuine concerns about her performance at this time. She did not accept that Mr Mors

had any such concerns.

30. Ms Kasim met with the Claimant later that day. The Claimant's account of the meeting is as follows:

"Around the 6 September 2017, one morning Alexa told me that she needed to meet with me later that day, but she did not tell me the reason for the meeting. I anticipated the usual ambush, but this time she:

(a) asked if me was aware of how delayed and mismanaged the Woodford project was;

(b) asked if me if I was happy with my job role, and said that perhaps, the role of Project Architect was forced upon me at my review in January 2017 with Mel; and

(c) she stated that I might not have an interest in the job role, and asked if that was the case. I said no, that it wasn't the case. I said that 'I would not have agreed to take on the role if it had not been in line with my own aspirations.' She then told me that my performance was seriously lacking and that 'it had now reached a very serious point'. I said 'that's interesting because I have never had that kind of feedback from either Mel or James' and she said that they were both in agreement. That both of them were 'tired of having to repeat things to me' and that I didn't seem to be picking it up. I had learnt to brace myself in the meeting room, as a coping method, so I think when she saw that I hadn't reacted the way she expected, she said that 'I don't think you know how serious this is now.' I had no knowledge of what exactly Alexa was referring to as no formal written or oral feedback had been provided to highlight her claims. She told me that due to my 'lack of progress' on the Woodford project that all of my tasks would now be overseen. She told me that the meetings with her would intensify and may occur on a weekly basis if she felt necessary. I was still trying to process what she said to me, however it crushed me as I didn't know if I could take any more micromanagement and criticism from her. Alexa said that if improvements were not made, then the meetings will have to become more frequent as required. She then said should 'things keep going the way they were now, that we could have to part ways'. I repeated; 'Part ways? As in.. I would not be working here?', she said 'well, potentially yes'."

31. Ms Kasim did not dispute that account, except that she said the only mentioned "parting ways" when the Claimant pressed her on what would happen if she did not meet their expectations. She also said that she closed the meeting by saying that she, the Claimant and Mr Mors would meet on 20 September 2017 to review the situation.

32. The Claimant accepted in cross-examination that it was reasonable for Ms Kasim to make the Claimant aware of the seriousness of the situation and that doing so did not amount to a breach of contract.

33. On 16 September 2017 most of the Respondent's staff took part in a charity event called "tough mudder". A photograph taken at the event shows the staff having

completed the event, with their arms around each other. The Claimant and Ms Kasim are next to each other in the photograph and have their arms around each other.

34. On 19 September 2017 Ms Clear sent the following email to both Mr Mors and Ms Kasim:

“Further to discussions [about the Claimant] can we look at performance poor and performance good over the last 2 weeks please.

Then what your evaluations are both of you – have they changed or remain the same as our LM [presumably “leadership meeting”] where this now needs to be performance related to an exit strategy. Remember we are too busy to let go straight away so good chance this may not be actions for a few months so we need to tread carefully to make sure it works for us short term if this is the end decision.”

35. Ms Kasim responded to that email the following day, outlining several concerns she had with the Claimant’s work since the meeting on 6 September. She concluded “In general I can’t say I’ve seen the level of improvement or at least effort I’d have expected to see to the point I actually wonder if she just thinks this is an issue I have and every so often I like to pull her into the meeting room to tell her off but it has no meaning...”.

36. The meeting on 20 September 2017 was rescheduled to take place on 22 September. The management team agreed that formal performance management proceedings were likely and therefore arranged for Ms Deadman to attend the meeting as well. The Claimant accepted in cross-examination that Ms Clear and Ms Kasim both still had concerns about her performance at this time.

37. First thing in the morning of 22 September the Claimant handed a letter of resignation to Ms Clear in the following terms:

“It is with regret that I submit my resignation as Architect at Clear Architects Ltd. As I am required under my contract to give you one month’s notice, I understand that my last day of employment will be on the 22<sup>nd</sup> October 2017.

I also want to take this opportunity to thank you for all of the help and advice that you have given me during my time at Clear Architects. I have enjoyed my time here and I am very grateful for having had the opportunity to work with you.”

38. Later that day the Claimant and Ms Clear had a meeting. Ms Clear reminded the Claimant of clause 18.2 of the contract and informed her that the amount that could be recouped was £1,900. She proposed to waive the right to claim that amount and that the Claimant would be paid for a further two weeks, up to 6 October, but only be required to work on 29 September. The Claimant said that she thought the suggestion sounded “very fair”. After the meeting Ms Clear sent an email to the Claimant at 16:36 confirming the proposal, including “That based upon the above agreement that we will waive the need to pay the reimbursement of 50% agency fee due to you breaking Clause 18.2 of your contract.” She asked the Claimant to “confirm in response to this email today that you are happy with this to be formalised”. The Claimant responded at



16:40 saying, "I am happy for this to be formalised and thank you again for your offer and well-wishes for the future!"

39. Ms Clear's evidence, which we accept, was that she genuinely believed, and indeed still believes, that clause 18.2 was enforceable.

40. At an exit interview on 29 September 2017 the Claimant said that her resignation had been triggered by the meeting with Ms Kasim on 6 September, which had come as a shock to her because of her previous positive feedback.

## CONCLUSIONS

### Unfair dismissal

41. In accordance with the guidance in *Kaur* and the agreed list of issues, I will first consider the alleged "last straw" – Ms Kasim's conduct during the meeting on 6 September 2017. I must decide the following:

41.1 Was that act by itself a repudiatory breach of contract?

41.2 If not, was it nevertheless capable of amounting to a "last straw"?

41.3 If so, did any of the acts alleged by C either individually or cumulatively amount to a breach of the implied term of trust and confidence?

41.4 If so, did C resign in response to such breach(es)?

42. Although the Claimant alleges that the 6 September meeting came as a shock to her, she also admitted that there were aspects of her performance that needed to improve and that the Respondent was entitled to address those in the way that it did. She also accepted that by early September 2017 both Ms Clear and Ms Kasim had genuine concerns about her performance (although Ms Clear had not communicated those concerns to the Claimant at the time). There is no evidence of malice or any ulterior motive on the part of any of the management team. In fact it is notable that the Respondent had an unusually reflective and analytical approach to management, as demonstrated by the regular consultation with Ms Deadman and in particular Ms Kasim's email to Ms Deadman on 1 September. That shows that Ms Kasim was finding management of the Claimant difficult and she was prepared to adjust her own behaviour to avoid appearing rude to the Claimant. There is certainly no indication that Ms Kasim wanted the Claimant out of the practice. That email, together with her later email of 20 September, are evidence of the genuine concerns she had about the Claimant's competence. The reference to an "exit strategy" in Ms Clear's email of the previous day is not surprising or sinister; it simply recognises that if the Claimant did not improve, her employment may need to be terminated on capability grounds.

43. The Claimant did not complaint about the meeting at the time and even on her own account of it, all that was being said was that her work would be more closely supervised in the short term and that she needed to improve.

44. It should be noted that the Claimant had somewhat unrealistic expectations of

the way that she should be managed, at one stage suggesting that because she preferred a more directional style of management, it was unreasonable of Ms Kasim not to adopt that style. Ms Kasim was of course entitled to take the view that the Claimant should be able to make decisions for herself, as a qualified architect, and to manage her with that in mind. When the Claimant made mistakes Ms Kasim was not always sympathetic. There is nothing inherently unreasonable about that, especially once the Claimant had qualified. Having concluded that the Claimant was not performing well enough as a qualified architect, Ms Kasim was entitled to consider that performance management proceedings might be appropriate. The meeting on 6 September 2017 amounted to no more than that situation being explained to the Claimant. The reference to “parting ways” was simply to make the Claimant aware that the Respondent was taking the matter seriously and dismissal was one possible outcome if she did not improve.

45. The Claimant conceded that Ms Kasim’s actions did not amount to a breach of contract, and in the circumstances of this case I consider that they were entirely innocuous. She was a manager taking reasonable management action in response to what she considered to be poor performance. The Tribunal should be slow to interfere with management decisions of this kind. Establishing a breach of the implied term of trust and confidence is a high hurdle, which could be undermined if reasonable management action of this kind were treated as capable of amounting to a “last straw”.

46. The Claimant has not articulated any “health and safety” issue and there was nothing to suggest any concern of this nature.

47. As the alleged last straw was not a fundamental breach of contract and cannot have contributed to one, it is unnecessary to consider the earlier conduct relied upon.

48. The Claimant was not constructively dismissed and her claim for unfair dismissal therefore fails.

#### Wrongful dismissal/ breach of contract

49. In her written submissions the Claimant argued that clause 18.2 of her contract of employment was void either as a restraint of trade or as a penalty clause. As such, the Respondent “suggesting that it was entitled to enforce it” was a breach of contract. Alternatively, even if it is an enforceable clause, the Respondent exercising its discretion to enforce it amounted to a breach of the implied term of trust and confidence. Those are novel arguments and I do not consider them to be well founded. Even if the clause is not enforceable, a mere assertion that it is cannot itself amount to a breach of contract, particularly when that assertion is based on genuine belief. The alternative argument is flawed because the Respondent did not ultimately exercise its discretion to enforce the clause.

50. During the hearing the Claimant had appeared to put this complaint in a different way – that the agreement to shorten her notice period was invalid and of no effect because Ms Clear led her to believe that clause 18.2 was enforceable and she was under pressure to accept. Therefore the original notice period took effect and she was entitled to be paid for it. That argument cannot succeed either. There is no basis in law to set aside the agreement reached with Ms Clear. Clause 18.2 was only one factor in

the discussion, and even if the Claimant believed that she was getting a benefit that was in fact not worth anything (because the clause was unenforceable anyway), that does not invalidate the agreement.

51. There is no legal basis on which the Respondent could be liable to pay the Claimant for two further weeks that she did not work. This claim therefore fails and is dismissed. It is unnecessary to determine whether clause 18.2 was enforceable.

Employment Judge Ferguson

7 September 2018