EMPLOYMENT TRIBUNALS

Claimant: Ms O Dunphy

Respondent: CDS (Superstores International) Limited

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: Manchester **ON:** 10 June + 16 August 2019

EMPLOYMENT JUDGE Batten (sitting alone)

Representation
For the Claimant: Ms P Hechter, lay representative
For the Respondent: Mr P Edwards, Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. the claim of constructive unfair dismissal is not well-founded and is dismissed; and

2. the claim for holiday pay is dismissed.

REASONS

1. The claimant claimed constructive unfair dismissal and unpaid holiday pay. The hearing of the claim took place over 2 days, having originally been listed for one day. The evidence of the parties and submissions

were completed only at the very end of the second hearing day. Accordingly, the Tribunal reserved its Judgment.

Evidence

2. An agreed bundle of documents was presented at the commencement of the hearing in accordance with the case management Orders. References to page numbers in these Reasons are references to the page numbers in the agreed bundle. It was agreed the claimant could add copies of text messages (as pages 43a-d) and mitigation documents (as pages 190-196) to the bundle. At the start of the hearing, the claimant also sought further disclosure from the respondent of all the Southport store employees' contracts for those employees working between April and June 2018. This was refused as the Tribunal considered that such wide disclosure was not relevant, proportionate or necessary to the determination of the claim or the issues to be decided.

3. At the start of the hearing the respondent produced a 9-page draft chronology which included a list of allegations of breach of contract that the respondent contended formed the basis of the claimant's case on that point. As the claimant had not previously seen the chronology, she was afforded time to read and check it and also to check the list of allegations of breach of contract, whilst the Tribunal adjourned to read the witness statements and key documents before hearing oral evidence. When the hearing resumed, the claimant confirmed that she agreed with the list of allegations of breach of contract as drawn. On the second hearing day, the claimant produced an expanded list of issues, which contained her comments on items in the respondent's list of issues which the parties had agreed on the first hearing day.

4. The claimant gave evidence from a witness statement. In addition, she called: Karen Senior, a manager with the respondent at the material time; and Christopher Hechter, the claimant's fiancé. Each of the claimant's witnesses gave evidence from witness statements and were subject to cross examination.

5. The respondent called: Shawn McInnis, the Southport store manager; Steven Trail, Operations Manager; Deborah Ford, manager of the respondent's Leyland store; and Kim Riley, manager of the respondent's Warrington store. Each of the respondent's witnesses gave evidence from witness statements and were subject to cross-examination

Issues to be determined

6. At the outset, the respondent produced a draft list of issues for the Tribunal to determine. Following discussion with the parties, it was agreed that the issues to be determined by the Tribunal were: -

Constructive unfair dismissal

6.1 Has the claimant established that the respondent was in fundamental and repudiatory breach of the claimant's contract of employment?

6.2 The claimant relies on the following alleged breaches of the implied duty of trust and confidence:

(a) The reduction in the claimant's working hours to 20 hours per week, with effect from 29 March 2018;

(b) The failure to provide a written contract confirming the reduction to 20 hours per week;

(c) The store manager's disclosure of the claimant's confidential personal data to various employees;

(d) Differential treatment of the claimant in that she was the only employee in store to receive that level of reduction in ours and no offer of a contract;

(e) Hostility in the workplace directed at the claimant;

(f) The respondent's failure to conduct the grievance proceedings in a timely, fair and objective way;

(g) The respondent's HR department's failure to follow standard industry practice;

(h) The failure of the store manager or HR to maintain sufficient contact with the claimant during her period of sickness absence;

(i) The unlawful deductions in the claimant's pay;

(j) The failure to pay monies as agreed at the grievance hearings;

(k) That the claimant's leave calculations were manipulated;

(l) The length of time for the claimant's grievance to be resolved (from 29 March 2018 to 1 October 2018).

6.3 The respondent accepts that the claimant resigned in response to the above matters and did not affirm any alleged breaches.

Holiday pay/unauthorised deductions

6.4 Was the claimant entitled to be paid holiday pay as set out in her ET1, such that she had been underpaid in the sum of £450.00?

Remedy

6.5 If the claimant was unfairly dismissed, to what remedy is she entitled? The claimant seeks compensation only.

Findings of fact

7. The Tribunal made its findings of fact on the basis of the material before it, taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. The Tribunal resolved such conflicts of evidence as arose on the balance of probabilities. The Tribunal has taken into account its assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts. The findings of fact relevant to the issues which have been determined are as follows.

8. The claimant commenced employment with the respondent on 22 September 2014 as a retail assistant. The respondent operates a chain of large retail stores known as "The Range". The claimant worked in the respondent's Southport store originally under a written contract which provided that a typical working week would consists of 16 hours' work, and subject to a rota.

9. The claimant's contract of employment also stated that the respondent "*reserves the right to amend [the claimant's] working hours and/or rota to meet changes in operating requirements. Any such changes will be subject to reasonable notice*."

10. In addition, the respondent's staff handbook provided in respect of changing working patterns, that "*We may need to amend your hours or rota from time to time to meet the changing needs of the business. You will be given adequate notice where possible and time to discuss how the changes will affect you."*

11. On 3 July 2017, the claimant's hours were increased to 20 hours per week by agreement. Nothing was put in writing to that effect.

12. On 16 October 2017, the claimant was told that her hours would be increased, to 30 hours per week because, at the time, there was a temporary shortage of staff in the Arts and Crafts section of the store which was expected to continue until after Christmas. Again, nothing was put in writing and the claimant was not issued with a revised contract of employment.

13. In December 2017, the claimant noticed that her holidays had been paid based on 20 working hours per week when she had been working for 30 hours per week. She raised the matter with the store manager, Mr

McInnis, and her holiday pay was corrected to reflect 30 hours' work per week.

14. On 27 March 2018, an employee of the respondent, Ms McDaid, had her hours reduced from 24 to 20 per week.

15. On 29 March 2018, the claimant was told by Mr Chris Kolon, the assistant store manager, that her hours would be reduced to 20 per week with immediate effect. The claimant was upset by this and said that she did not agree to the change. The next day, the claimant complained to the store manager, Mr McInnis, who told the claimant that the change was to start from 2 April 2018 and that she would be reverting to the previous arrangement whereby she worked 20 hours per week.

16. On 2 April 2018, the claimant submitted a grievance about the reduction in her working hours. She complained that the reduction in hours was not agreed and that she had been given no notice of the change and that she was the only employee whose hours were being reduced. The claimant also complained that Mr Kolon had been insensitive and had in her view "gloated" as he told her about the change in hours.

17. Following receipt of the claimant's grievance, Mr McInnis told the claimant that she could work 30 hours per week for the next month in lieu of the notice she should have been given of the change in hours. However, on 5 April 2018, the claimant was told by the office manager that HR had said that the claimant could not in fact work a further month on 30 Hours per week. This meant that, on 6 April 2018, the claimant had to finish work for that week, because she had by then worked 20 hours.

18. On 23 April 2018, a grievance hearing took place, conducted by the respondent's Leyland store manager, Ms Deborah Ford. During the meeting, the claimant accepted that she had been given 30 hours' work per week because of the needs of the Arts and Crafts department at the time. The claimant said that because she had worked 30 hours per week for some time, she presumed that those were her contractual hours.

19. The grievance hearing was adjourned so that Ms Ford could interview Mr McInnis and also Mr Steven Trail, the operations manager, about the issue of contracts to staff in the store and also about the claimant's holiday entitlement and holiday pay. Mr McInnis pointed out that there had been a week just before Christmas 2017 when the claimant had asked to work only 20 hours for personal reasons. Later, Mr Trail had said that the week before Christmas the claimant had asked to work only 20 hours per week and that this had been recorded partly as holiday. The manager of the Arts and Crafts department, Karen Senior, was also interviewed by Ms Ford. Ms Senior told Ms Ford that she was told, at the time, by Mr McInnis that the offer of 30 hours per week to the claimant was on the basis of it being a permanent change to her hours.

20. On 27 April 2018, the grievance hearing resumed and the claimant told Ms Ford that there were members of staff present at a staff briefing at which Mr McInnis had told them all that their additional hours were safe. Ms Ford re-interviewed Mr McInnis about what he had said to employees about their hours and Mr McInnis told her that he had informed staff that their 'additional hours' were safe until he was told otherwise.

21. On 15 May 2018, the respondent sent the claimant its decision on her grievance which was to turn down the grievance on the basis that Ms Ford had concluded that the claimant was aware that the increase to her hours constituted additional or extra hours over and above those provided in her contract.

22. On 22 May 2018, the claimant appealed against the grievance outcome. The claimant's grounds of appeal were that she considered that she had a "verbally agreed 30-hour contract which was changed without notice, that she had lost money as a result and she was unhappy with the way the managers handled the situation. On 26 May 2018, the claimant added a complaint about her holiday pay having been calculated on the basis of only 20 hours per week.

23. On 7 June 2018, an appeal hearing took place conducted by Ms Riley, in the course of which Ms Riley agreed that the claimant's contractual hours would be increased from 16 to 20 hours per week because the claimant had been working 20 hours per week for over a year and that the respondent would pay the claimant's disputed holiday pay at the rate of 30 hours per week to reflect the hours the claimant had worked at the relevant time.

24. On 15 June 2018, the respondent sent the claimant its decision on her grievance appeal which was to uphold Ms Ford's decision on the claimant's grievance, noting that the claimant had a contract for 16 hours per week which had subsequently been changed to 20 hours per week, and confirming that the claimant's recent holiday pay would be paid at the 30 hours per week rate which the claimant had been working at the time of the holidays in question.

25. On 22 June 2018, the claimant submitted a second appeal to Mr David Gartland, the respondent's HR manager. The second appeal was referred to the respondent's Preston store manager to handle. However, on 6 August 2019, the claimant emailed Mr Gartland to say that she did not wish to go through a second appeal.

26. The claimant was subsequently signed off work, sick, from 28 June 2018, with stress.

27. On 1 October 2018, the claimant resigned alleging that the respondent was in breach of her contract of employment in relation to the reduction in her hours from 30 to 20 per week.

28. At termination of the claimant's employment, the claimant had taken just over 86 hours of paid holiday in the holiday year. The claimant's accrued holiday entitlement to the date of her resignation on 1 October 2018 was 78 days' entitlement. The respondent has not sought repayment of the excess.

The Law

29. A concise statement of the applicable law is as follows.

Constructive dismissal

30. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is dismissed if the employee terminates their contract of employment, with or without notice, in circumstances such that the employee is entitled to terminate their contract without notice by reason of the employer's conduct.

31. The case of Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 provides that the employer's conduct that gives rise to constructive dismissal must involve a repudiatory breach of contract, or a significant breach going to the root of the contract of employment, showing that the employer no longer intends to be bound by one or more of the essential terms of the contract of employment. In the face of such a breach by the employer, an employee is entitled to treat themself as discharged from any further performance under the contract, and if the employee does treat themself as discharged, for example by resigning, then they are constructively dismissed. If, however, the employee delays in resigning after the employer's breach, the employee may be taken to have affirmed the contract and, if so, may lose the right to claim that they have been constructively dismissed.

32. A course of conduct can, cumulatively amount to a fundamental breach of contract entitling an employee to resign following a "last straw" incident even though the last straw does not by itself amount to a breach of contract, as held in the case of Lewis –v- Motorworld Garages Ltd [1985] IRLR 465. However, the last straw must contribute in some way to a breach of the implied term of trust and confidence.

Holiday pay

33. Section 27 (1) (a) of the Employment Rights Act 1996 defines 'wages' as:

"*any fee, bonus, commission, holiday pay or other emolument referable to [a worker's] employment, whether payable under his contract or otherwise*."

Hence, the non-payment of holiday pay can be an unauthorised deduction from wages.

34. The Working Time Regulations 1998, Regulations 13 and 13A, provide that every worker is entitled to a minimum of 5.6 weeks' paid holiday entitlement in each holiday year (pro-rata for part-time working).

35. Regulation 14 of the Working Time Regulations 1998 provides for an employee's entitlement to outstanding accrued untaken holiday pay at the termination of employment and provides a formula for calculation of such entitlement. For workers who work irregular hours, the rate of a week's pay, as the basis for the applicable amount of holiday pay, is to be calculated pursuant to sections 221 – 224 of the Employment Rights Act 1996.

36. In the course of submissions, the Tribunal was referred to a number of cases by the respondent, as follows:

Spencer v Marchington [1988] IRLR 392

WA Goold (Pearmark) Limited v McConnell and another [1995] IRLR 516

Russell and others v Transocean International Resources Limited and others [2012] IRLR 149 UKSC

Bateman and others v ASDA Stores Limited [2010] IRLR 370

Wandsworth LBC v D'Silva and another [1998] IRLR 193 CA

Savoia v Chiltern Herb Farms Limited [1982] IRLR 166 CA

Judge v Crown Leisure Limited [2005] IRLR 823 CA

Prometric Limited v Cunliffe [2016] IRLR 776 CA

Heimann and another v Kaiser GmbH [2013] IRLR 48 ECJ

Greenfield v The Care Bureau Limited [2016] IRLR 62 ECJ

The Tribunal took these cases as guidance but not in substitution for the statutory provisions.

Submissions

37. The representative for the claimant made a number of detailed submissions which the Tribunal has considered with care but do not rehearse in full here. In essence it was asserted that: - the claimant was forced to resign because of the respondent's behaviour towards her which created a hostile environment at work; that it could not be a breach of

contract to increase hours; that the way her hours had been reduced was unprofessional; and that the respondent had misrepresented things to her when its managers suggested that 30 hour contract did not exist because a number of employees were working 30 hours per week at the Southport store. In respect of her claim for holiday pay due at termination of employment the claimant said that she could not dispute the respondent's figures or calculations.

38. Counsel for the respondent made a number of detailed submissions which the Tribunal has considered with care but do not rehearse in full here. In essence it was asserted that: - the respondent was not in breach of the claimant's contract of employment when it reduced her hours from 30 to 20; express terms of the contract allow for this; that the other breaches contended for were not repudiatory; and, by continuing to work for 3 months and thereafter whilst on sick leave for a further 4 months, the claimant had in any event delayed in resigning for so long that it amounted to an affirmation of any breach of contract. In respect of the claim for holiday pay, the respondent's case was that the claimant had taken in excess of her entitlement calculated on average hours worked and so no payment was due.

Conclusions (including where appropriate any additional findings of fact)

39. The Tribunal has applied its relevant findings of fact and the applicable law to determine the issues in the following way.

40. The claimant contends firstly that, when the respondent increased her hours from 20 to 30 hours per week in late 2017, the effect of that was to vary her contractual hours on a permanent basis. The claimant then contended that the respondent breached her contract of employment when it unilaterally reduced her working hours from 30 to 20 in March 2018. The claimant confirmed in cross-examination that it was the reduction in hours that led to her resignation and claim of constructive dismissal.

41. The Tribunal considered the provisions of the claimant's contract. The Tribunal has concluded from the written document that the claimant's contract does not provide for 30 hours per week and, instead, the written contact provides only that "*a typical working week will consist of 16 hours*". This provision does not, in fact, guarantee the claimant even 16 hours' work every week. The Tribunal noted that the claimant's hours had been increased to 20 per week without anything being put into writing and later to 30 hours per week. Ms Riley had retrospectively sanctioned the increase to 20 hours per week in the course of the grievance appeal such that the claimant's contractual hours became 20 per week.

42. Importantly, the claimant's contract includes a provision that the respondent reserved the right to amend working hours and/or rotas to

meet changes in operating requirements and that any changes would be upon reasonable notice. The Tribunal considered that such an amendment to working hours could be either to increase or to reduce hours – the contract does not specify only one of these possibilities.

43. The Tribunal had no hesitation in concluding that this was what had happened in late 2017. The respondent was amending the claimant's hours to cover business needs in terms of staffing the Arts and Crafts department for a temporary period and that the respondent was contractually entitled to do so. Here, Ms Senior's evidence was key. She told the Tribunal that she had suggested to the store manager that he increase the claimant's hours because the Arts and Crafts department in the store was experiencing staffing difficulties due to the departure of an employee at a time when the respondent had in place a recruitment freeze. It was Ms Senior who described the increase as "extra hours" and "additional hours", and she confirmed that she did not know for how long those hours would be available. Although Ms Senior's witness statement suggested that Mr McInnis had indicated to her that the claimant's extra hours were to be permanent, in cross-examination she conceded that all that was agreed was the allocation of additional hours to address the transient issue of staffing in the department and that Mr McInnis did not say that the increase was permanent. The claimant said, in the course of the grievance hearing and under cross-examination, that she had "presumed" that 30 hours was "part of her contract" from which the Tribunal concluded that the claimant was unclear about the basis for the additional hours given to her, but this does not create a contractual entitlement to them.

44. The claimant also sought to argue that her hours had been varied by custom and practice or by oral variation. The Tribunal did not agree with these suggestions when considered in the context of the terms of the contract which expressly provide for amendments to hours. The claimant also sought to argue that other employees had contracts for 30 hours' work per week. However, absent a collective agreement on working hours, the Tribunal did not consider that the contractual hours of colleagues can have any bearing on the claimant's contractual hours.

45. It therefore follows that the respondent was within its rights under the claimant's contract of employment to increase and later reduce the claimant's hours as it did in March 2018. It did not breach the claimant's contract in so doing.

46. The claimant also relied on a number of other matters which she says amounted to breaches of her contract but the Tribunal disagreed with that analysis. In respect of the handling and timing of the grievance process, the Tribunal makes no criticism of the respondent. It appeared to the Tribunal that the respondent had handled the claimant's grievance in a reasonable and thorough manner and in accordance with a fair procedure.

The process took approximately 2.5 months, from early April to mid-June 2018, when the claimant was offered but declined a second appeal.

47. The complaint of hostility in the workplace was not particularised by the claimant. In so far as it related to the store manager, it was apparent from her evidence that the claimant had sought to avoid him, for example by requesting that her grievance hearing take place when he was not at work. The complaint that Mr McInnis had disclosed the claimant's confidential personal data to employees arose because an employee in the warehouse apparently knew that the claimant's grievance hearing was to take place - it was unclear how this had occurred, what exactly was known to the employee (and if that in fact amounted to any disclosure of confidential data) or who was responsible. The complaint about a failure to keep in touch with the claimant during her sickness absence is contradicted by the documents in the bundle at pages 139 – 163. The claimant was in contact with Mr Garland of the respondent about her situation by email in any event. It remains unclear what the claimant expected Mr McInnis, as store manager, to do and the Tribunal considered that he was mindful of the fact that part of the claimant's grievance had been about his attitude to her and his handling of the changes to her hours. It was the Tribunal's view that none of these matters amounted to a fundamental breach of the claimant's contract and, in any event, the claimant's evidence was that they had not been the operative cause of her resignation.

48. The claimant's primary case was that she resigned because of the reduction in hours in March 2018. However, she did not resign until 1 October 2018, some 6 months later. In those circumstances, the Tribunal could not conclude that the claimant had resigned in response to the reduction in hours, even if that had been in breach of her contract which the Tribunal has found was not so. In any event, the Tribunal accepted the submissions of Counsel for the respondent, to the effect that the claimant worked on for 3 months and then remained under contract whilst off sick for at least a further 3 months. The claimant told the respondent that she did not wish to pursue a second appeal at the end of August 2018. It is unclear what happened between then and 1 October 2018 or what prompted the claimant to resign on that date and after such an elapse of time.

49. In light of all the above, the Tribunal concluded that the claimant's claim of constructive dismissal is not well-founded and shall be dismissed.

50. In respect of the holiday pay claim, the claimant's representative conceded in submissions that the claimant did not dispute the respondent's figures which appear in the bundle at pages 60 – 61. The claimant's case had been that her holidays and holiday pay should have been calculated based on her contractual hours which she maintained were 30 hours per week. The Tribunal has found that the claimant's contract does not

provide for 30 hours per week and instead, the written contact provides for 16 hours per week, albeit that Ms Riley had sanctioned the increase to 20 hours per week in the course of the grievance appeal. In any event, the respondent's figures used to pay the claimant were based upon the average hours worked by the claimant. In the 13 week period prior to her sickness, the claimant's average working hours were 22 hours per week. The Tribunal considered that to be the correct approach for an employee working irregular hours over the calculation period. Using a figure of 22 hours per week is more generous to the claimant but it makes little difference because the claimant had taken in excess of her accrued entitlement.

51. In those circumstances, no further holiday pay is due to the claimant at the termination of her employment and the claim for holiday pay is therefore dismissed. The respondent has confirmed to the Tribunal that it has not and will not take steps to recover the overpayment.

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Employment Judge Batten
6 December 2019

JUDGMENT SENT TO THE PARTIES ON

11 December 2019

FOR THE TRIBUNAL OFFICE