

JERSEY / JUDGMENT

Estelle Burns v Voisin Law

Source: jerseylaw.je · Research copy typeset by Esheria. Not court-issued or certified.

IN THE JERSEY EMPLOYMENT AND DISCRIMINATION TRIBUNAL IN THE MATTER: BETWEEN ESTELLE BURNS CLAIMANT AND VOISIN LAW RESPONDENT TRIBUNAL JUDGMENT Date of Hearing: 22 to 24 February 2021 Before: Mrs H Westmacott, Deputy Chairman Mr C Holloway, Panel Member Miss R Pitman, Panel Member Appearance: For the Claimant: Advocate P Nicholls, Steenson Nicholls LLP For the Respondent: Mr I Maccabe, No 5 Chambers DECISION The Claimant's claims for constructive unfair dismissal and wrongful dismissal fail. The Claimant's claim for holiday pay is agreed and an award is made in respect of this claim.

REASONS

Introduction

1. The Respondent, a Jersey law firm, employed the Claimant as an Advocate in its litigation department from December 2015 until 20 March 2020.
2. On 20 April 2020 the Claimant submitted a claim to the Tribunal for constructive unfair dismissal and wrongful dismissal (the "Claims") on the following grounds:
 - (1) the Respondent's course of conduct, which concluded with an incident on 17 February 2020 (the "Last Straw") amounted to a repudiatory breach of the term of trust and confidence implied into the contract of employment between the parties, entitling the Claimant to treat herself as constructively dismissed and terminate the contract of employment between the parties on 20 March 2020;
 - (2) the dismissal was wrongful and the Claimant was not paid various amounts that she was owed in respect of her notice period, which she alleges include 12 weeks' wages, benefits for 12 weeks (including pension scheme contributions, medical insurance and life assurance) and pay for 6 days' holiday which would have accrued during her notice period.
3. The Respondent defends the Claims on grounds that the Respondent did not breach the implied term of trust and confidence, the Claimant resigned with immediate effect on 20 March 2020 having been off sick since 20 February 2020 and there was no dismissal, constructive or otherwise. Accordingly, there was no wrongful dismissal and the Claimant is not entitled to any payment in respect of any notice period.
4. A case management hearing was held on 5 June 2020 at which this matter was set down for a Final Hearing ("Hearing"). This judgment records the Tribunal's decision following that Final Hearing, together with the reasons for that decision.
5. The Claimant also brought a claim for 6 days' holiday that

accrued prior to termination of her employment, but which she did not take and was not given payment in lieu of. The Respondent indicated at the conclusion of the Hearing that this claim was agreed. Accordingly, the Claimant is awarded the amount claimed in respect of this claim of £1,872. Documents

6. The Tribunal received witness statements and heard oral evidence at the Hearing from the following individuals:
 - (1) the Claimant;
 - (2) Melanie Guest (“MG”), employed by the Respondent until February 2017 as an Assistant Conveyancer;
 - (3) Julie Carré (“JC”), Legal Secretary in the Respondent’s litigation department (“VLD”);
 - (4) Emma Stewart (“ES”), Head of the Respondent’s human resources department (“HR”);
 - (5) Jenny Costford (“JCO”), Assistant Manager in HR;
 - (6) Frances Littler (“FL”), Advocate in VLD; and
 - (7) Dexter Flynn (“DF”), English Solicitor in VLD.
7. The Respondent provided a file of documents for the Hearing (the “File”), which was agreed by the Claimant. References in square brackets below are, unless the context suggests otherwise, to the relevant page of the File. On day two of the Hearing the Respondent sought to admit an additional document. After a brief discussion the Claimant did not object to this document being admitted and it was included at the back of the File.
8. On day three of the Hearing the Respondent sought to admit an email received by the Respondent in September 2020. The Claimant objected to this email being admitted on the grounds that it would suffer prejudice if it were to be admitted. The Claimant did not know the context in which the email was sent and would not have the opportunity to investigate this. In addition, the Respondent had been in receipt of the email for at least four months prior to the Hearing and could give no good reason as to why it had not been disclosed earlier. Accordingly, and on the basis that the Tribunal considered it to be of limited, if any relevance, this email was not admitted.
9. Both parties provided written legal submissions and gave oral closing statements at the end of the Hearing.
10. When making this judgment the Tribunal considered all of the evidence provided by the parties (save for that referred to in paragraph 8 above) and made the findings of fact set out below. Where there have been factual disputes to resolve the Tribunal has done so on the basis of its assessment of the credibility of the witnesses and the consistency of their accounts with the rest of the oral and written evidence. Evidence

11. The Claims are based on several incidents that took place over a period of nearly four years (the “Incidents”). The Claimant asserts that these Incidents made up the course of conduct that constituted a repudiatory breach of the term of trust and confidence by the Respondent. The parties have provided a great deal of detail in relation to these Incidents in both their pleadings and their witness statements. While the Tribunal has considered all of the information provided, it is not necessary to repeat it all in detail in this judgment and only the key points in relation to each of the Incidents is referred to. Timekeeping Comments
12. The Claimant referenced the following occasions on which she asserts her colleagues commented on her timekeeping and whereabouts in the following ways:
 - (1) in February 2017 when the Claimant arrived at the office, JC said “we thought you had got lost”;
 - (2) in June 2017 when the Claimant arrived at the office, JC commented about “court taking so long these days”;
 - (3) in August 2017 after arriving late into work, a HR officer told the Claimant that FL and the litigation secretaries had been “concerned about her whereabouts and safety” although none of her colleagues showed any such concern when she arrived in the office;
 - (4) in August 2018 and August 2019, JC and FL remarked how unsatisfactory it was that the Claimant was leaving work at 4.30pm;
 - (5) in Spring 2019, JC made a comment regarding the Claimant being unable to rearrange a client call which she scheduled out of the office during a fire drill;
 - (6) in September 2019 when the Claimant arrived at the office, JC said “I must remember to get a new battery for my watch”;
 - (7) in October 2019 after returning to the office from the Royal Court, FL said “I came to see you earlier but you had apparently gone to court” in a sarcastic manner; and
 - (8) in February 2020 when the Claimant told FL she was going to observe a trial she had previously been working on, FL said “I would have thought you’d have had enough of that case” in a rude and sarcastic manner.
13. In addition, the Claimant asserts that JC questioned others, including a bursary student in June 2017, about the Claimant’s whereabouts and sought to monitor the Claimant’s whereabouts and timekeeping either herself or through others.
14. The Claimant acknowledged that she was not always in the office during her contracted hours as her role with the Respondent necessitated her to be elsewhere for many reasons, including for example, being in Court or meeting with clients outside of the office, attending police headquarters, customs and immigration or parish hall enquiries and assemblies. In addition, on occasion she may have left the office before her contracted finish time of 5.30pm or returned slightly late from lunch or had an early morning personal appointment

(such as the dentist), but she also worked at times outside of her contracted hours, for example she would often start early or work in the evenings and at weekends if work necessitated it, which it often did. The Claimant noted that on all of the occasions when her colleagues made comments about her timekeeping she was out of the office for good reason and/or made up any time she missed.

15. The Claimant also made the point that her timekeeping and whereabouts were not the concern of either JC or FL. They had no authority over her and it was not part of their job to monitor or comment on where she was at anytime. In addition, JC and FL were not aware of where the Claimant was required to be at all times in order to carry out her role with the Respondent and neither did they have any right to be. Conversely, the Claimant's more senior colleagues, whose concern it was, never raised any complaint during her employment in relation to her timekeeping. The Claimant felt that JC and FL made these comments simply because they did not like her. The Claimant also alleged that many of these comments were made in front of other members of the litigation department to belittle and embarrass the Claimant and indeed that is how they made her feel.
16. JC admitted making a number of these comments and asserted that they were just "office banter". However, she also noted that she said them as she felt the Claimant was taking advantage of the Respondent by not working the hours she was paid for. FL could not recall making the comments exactly as alleged, although she did remember some general discussion in relation to the Claimant attending the trial that she had previously been working on. In any event, FL said that the comments would have been genuine and she would not have spoken to the Claimant in a rude or sarcastic manner. FL did however openly admit at the Hearing that she did not like the Claimant. Reporting the Claimant
17. The Claimant makes reference to the following occasions where her colleagues reported her to either HR or other more senior colleagues:
 - (1) in May 2016, JC reported to a partner that she had seen a legal aid funded client that the Claimant was acting for out socialising;
 - (2) in September 2016, JC reported the Claimant to HR for failing to comply with the Respondent's absence policy on Battle of Britain day;
 - (3) in March 2018, JC, FL and another litigation secretary responded to a staff survey criticising the Claimant's time keeping [65]; and
 - (4) on 17 February 2020 after the Claimant arrived into the office late following an early morning dentist appointment, FL and another litigation fee earner reported the Claimant's timekeeping to HR.
18. The Claimant maintains that none of these complaints were justified. It was not relevant that the legal aid funded client had been seen socialising as they had been properly assessed for legal aid. The Claimant's failure to comply with the absence policy on Battle of Britain day was not material and she was not the only one who did not fully comply with the policy. The

Claimant's timekeeping was not flawed and neither JC, FL nor the other litigation secretary or fee earner were sufficiently appraised of the Claimant's whereabouts at all times to be in a position to report on her time keeping. In addition, it was not their role to be so appraised or to make such reports. The Claimant asserts that JC and FL had taken a disliking to the Claimant and they made these reports as they wanted to make life difficult for her.

19. JC and FL admitted that they made these complaints and that they were not employed to monitor or report on the Claimant's timekeeping or whereabouts. However, both maintained that their complaints were valid and that they had every right, and indeed, it was their "moral obligation" to make them.
20. FL admitted that she was not always aware of what the Claimant was doing when she was not in the office and that she did not try to substantiate the complaints she made to HR before making them. She also confirmed that she decided to make the complaint to HR even after she had already mentioned her concerns to DF and DF had told her there was no need to concern herself with the matter. However, FL said she disagreed with DF's opinion and she was concerned by the frequency with which the Claimant left the office early so decided to make the complaint in any event. Exclusion from "the Clique"
21. DF describes VLD as a small and compact unit, which included the following personnel during the Claimant's employment: one partner, DF, FL, another full time fee earner, a part time fee earner, JC, three other secretaries and a trainee [98]. The Claimant asserts that JC, FL, the other full time fee earner and the three other secretaries formed a "clique" and the attitude of the clique and the way in which they behaved towards the Claimant made her feel excluded [78].
22. The Respondent denies the existence of any clique, but both JC and FL stated that the majority of the women in VLD got on very well with each other. They were good friends and some of them socialised together outside of work. Many of them had started their careers with the Respondent and had been there for many years. JC said she felt like a "work mummy" to some of them.
23. More specifically, the Claimant asserts she felt excluded due to JC's general attitude towards her. For example, she asserts:
 - (1) in February 2018, when the Claimant walked past JC, JC had an unpleasant, aggressive look on her face which changed as soon as she saw another colleague;
 - (2) in December 2018 JC printed off one copy of a document when the Claimant had asked for two and JC threw the document on the Claimant's desk; and
 - (3) from March 2016 onwards, when the Claimant said good morning to JC, JC ignored the Claimant or responded with a grunting sound and made unpleasant and aggressive facial expressions towards her.

24. JC denies that she looked at the Claimant in an aggressive way or that she grunted at her and JC asserts that she regularly said good morning to the Claimant. JC also denies throwing any documents on to the Claimant's desk and said that if she only printed one copy when two were required, this was an unintentional error.
25. In addition, the Claimant asserts that FL refused to assist her when she made reasonable requests for FL's help. Including:
 - (1) in October 2017 upon returning to the office from holiday the Claimant received an email from FL saying "apparently you had directed clients to me in your absence";
 - (2) in July 2018, a bill of costs needed to be prepared on a matter on which FL was the fee earner and the Claimant asserts that FL refused to assist with this when asked; and
 - (3) in September 2019, the Claimant asked FL to respond to a client and FL replied saying she would not be able to do so that morning and asked if the response could wait until the Claimant returned to the office.
26. While FL was aware of the instances that the Claimant was referring to, FL disputes that she unreasonably refused to assist, saying either that she did assist or that, if she suggested that the Claimant did the work herself, she was justified in doing so. FL said that she got on and worked well with the Claimant until March 2017 when FL started to become concerned about the Claimant's timekeeping. While FL acknowledged she did not like the Claimant she said she did not seek to undermine or exclude the Claimant.
27. The Claimant also referred to the following seating arrangements which she felt were designed by JC and FL respectively and sought to further exclude her:
 - (1) in 2016 and 2017, the Claimant was the only person from the litigation department seated on a different table at the Christmas Party; and
 - (2) in August 2019, the Claimants desk was moved to the periphery of the litigation department.
28. The Respondent denied that FL had anything to do with the desk move and noted that the Claimant was not the only person whose desk was moved at that time; a trainee was joining the department and another employee needed to move. The Respondent asserted that the Claimant was asked whether she had any issues or concerns about her new location and she expressed none. She did ask why it was happening but JCO told her she could not discuss the specific details [73]. At the Hearing JCO explained that this was because she could not disclose why the other employee was being moved.
29. The Respondent asserts that the reason the Claimant was on a different table at the Christmas party was because, in 2016, HR had taken the decision to mix people from different departments. However, when looking at the seating plans for 2016 and 2017 at the Hearing, JCO confirmed that the Claimant appeared to be the only person from the litigation department who was seated on a different table. The Respondent also noted that the Claimant was seated with her litigation colleagues at the 2019 Christmas party, although the

Claimant said that this was because she specifically asked to be seated at the same table to try to improve her relationship with the clique. She also noted that she did not attend the Christmas party in 2018 as she was too upset about the seating arrangements in the previous years and did not want the embarrassment of her non-litigation colleagues asking her why she was seated on a different table. Inaction by the Respondent

30. There are general references to complaints being made by the Claimant about the matters referred to above in both the Claimant's and the Respondent's evidence. However, the only specific details provided by the Claimant in relation to such complaints are as follows:
 - (1) at some point during the latter part of 2016 the Claimant raised the issues she was having with JC with DF and DF told the Claimant that she needed to try to sort them out herself;
 - (2) on the Monday following the 2016 Christmas party the Claimant reported to JCO and ES that she felt she was seated on a different table at the instigation of JC and that JC monitored and continually questioned her whereabouts and timekeeping. ES told the Claimant to sort these issues out for herself;
 - (3) in summer 2017 the Claimant told ES and JCO about the comments that JC had been making. A week or so later JCO told the Claimant that one of the partners had had a word with JC, but the Claimant asserts this did not make any difference to the way in which JC behaved;
 - (4) on 19 March 2018, following a conversation with HR about the issues she was experiencing with JC, the Claimant made a formal complaint against JC. The Complaint was made to HR and copied to the VLD partner and to DF. The Claimant and DF subsequently discussed the complaint and it was agreed that an external mediation would be held to try to resolve the situation. A mediation agreement was reached between the Claimant and JC on 2 May 2018; and
 - (5) on 23 September 2019, the Claimant reported the issues she had with FL to JCO. The Claimant asserts that JCO advised the Claimant to keep a written log of all the events that the Claimant thought were relevant, but JCO denies giving this advice.
31. The Claimant asserts the Respondent should have done more to resolve the issues she was experiencing. In particular, someone should have followed up after the mediation to see how things were going, but no one ever did.
32. The Claimant asserts that DF was her line manager, but DF maintained that, while he supervised the Claimant on certain matters, he was not her line manager. DF asserts that his door was always open for any issues the Claimant had, but he would have expected the Claimant to refer non-work related matters to HR.

33. DF said he had not witnessed any unpleasant or intimidating behaviour and would have dealt with it if he had. He knew the Claimant and JC did not get along prior to the Mediation but he said “that is life”, people don’t always get along and he thought they were professional enough to deal with it themselves. He noted that the Claimant was an experienced Advocate and should have been well placed to deal with the situation.
34. However, DF also said that when he became aware of the Claimant’s complaint in March 2018 his response was not to just leave the Claimant and JC to sort it out, he realised the matter was serious, but he was conflicted. All the parties worked together in a small team, JC was DF’s secretary and the Claimant was one of his colleagues with whom he felt he had a good relationship. Accordingly, he suggested external mediation so the issues could be dealt with outside of the office. He had no involvement in the mediation and only spoke to the mediator at the end, when she confirmed that an agreement had been reached. He did not discuss it with either the Claimant or JC, save to say he was pleased it was resolved. He asserted the mediation was a confidential process [101 and 102].
35. DF said he thought that the mediation had resolved the issues and he recalled going out socially with both the Claimant and JC a year or so after the mediation and everyone getting along well. DF said he understands that disagreements can spiral out of control, but he did not think that was happening after the mediation. He said that the matter was not on his radar, it was not raised with him daily, weekly, monthly or even yearly.
36. When asked at the Hearing why the Claimant did not raise a grievance against FL or any other members of the alleged clique, the Claimant said she felt there was little point because the mediation had not worked. JC carried on with her behaviour undaunted. Mediation
37. On 2 May 2018, JC and the Claimant reached a mediation agreement in relation to the Incidents that occurred between them prior to this date. The Respondent asserts that by way of the mediation agreement the Claimant agreed to draw a line under these incidents and they are therefore not relevant to this dispute. However, the Claimant asserts that the mediation agreement was no longer valid as JC breached it when she continued to make comments about the Claimant’s timekeeping and with JC’s general attitude towards the Claimant on a daily basis.
38. The Respondent further referenced the fact that the Claimant’s statement prepared for the mediation confirms that the only issues she had encountered with the Respondent were with JC [160]. The Respondent’s representative asked the Claimant why she did not raise any issues with FL or the alleged clique at this stage. The Claimant responded by saying that she was not aware that she was “being ganged up on” at that time. Although the mediation took place after the staff survey, the Claimant had not known the extent of the comments that had been made about her in the survey or who they had been made by at that stage. If she had, she would not have proceeded with the mediation against JC alone. She said that the issues with FL and clique became evident as time went on. Last Straw

39. On 17 February 2020, the Claimant arrived at work at around 10:30 following a dental appointment and saw FL and another litigation fee earner in the HR office.
40. JCO said that FL and the other fee earner had been to see JCO to express their frustration at the Claimant's whereabouts, timekeeping and attendance at "numerous" dental appointments. These appeared to JCO to be genuine concerns of two solicitors, which she felt she needed to look into. When asked at the Hearing why JCO did not ask FL to raise a formal grievance against the Claimant, JCO said it was not necessary as the complaint related to timekeeping and it "was going to be investigated". Accordingly, JCO obtained print outs of the Claimant's door system report showing when the Claimant used her key fob to enter and exit the building ("Key Fob Records"). JCO noted that there were "discrepancies" on the Key Fob Records, which she reviewed with ES, who asked JCO to speak to the Claimant about them [95, 124 and 125].
41. At the Hearing ES confirmed that the key fobs do not always provide an accurate record of when people enter and leave the building; people can enter or leave the building at the same time as someone else and so did not use their key fob. In addition, the Key Fob Records only illustrate when employees have been in the office, they do not give any information regarding when employees are working elsewhere, for example, at court or out meeting clients. ES also confirmed that she and JCO did not look at any other records, for example the Claimant's time sheets, prior to questioning the Claimant about her whereabouts. She said that they were simply trying to establish whether there were grounds for an investigation and they wanted to have a conversation with the Claimant before commencing any investigation. ES stressed at the Hearing that the questioning of the Claimant was not a formal investigation but was an informal discussion. ES confirmed that, with hindsight, there may have been better ways in which they could have ascertained the substance of the complaints before putting them to the Claimant.
42. In the event, an hour or so after the Claimant arrived at work, JCO went to the Claimant's desk and asked the Claimant to come and speak to her in the HR office. The Claimant's desk is situated within VLD's open plan office and in view of the other litigation fee earners and secretaries. The Claimant said that she heard some of the secretaries snigger when JCO approached the Claimant and she followed JCO back to the HR office. JCO said she did not hear any sniggering.
43. JCO said that she tried to telephone the Claimant to ask her to come to the HR office but the Claimant did not answer the call. When JCO was asked at the Hearing why she did not email the Claimant she said she did not want to question the Claimant about her time keeping over email, so JCO went in person to the Claimant's desk to ask her to come to the HR office. However, JCO said she did not make the request for the Claimant to come to speak to JCO in an overt manner; she did so quietly.

44. JCO told the Claimant she was undertaking a spot check on her timekeeping and asked her to explain certain comings and goings from the office. The Claimant asked whether the spot check was being undertaken following FL making a complaint and JCO denied that it was. The Respondent has since admitted it was not a spot check and that the questioning was following the complaint made by FL and the other litigation fee earner. JCO said that she told this “little white lie” as it was “diplomatic” to keep the source of the complaint confidential and she did not want to “inflame the situation”. At the Hearing JCO said “maybe it was wrong, maybe I should have done it differently, but at the time it seemed the right thing to do”. ES confirmed at the Hearing that, with hindsight, the matter should have been dealt with differently.
45. The Claimant asserts that she was “ambushed” by both JCO and ES and was “interrogated” in a “threatening” manner [82]. The Claimant noted at the Hearing that ES and JCO had always spoken to her courteously in the past, but on this occasion they did not. Both JCO and ES deny ambushing or interrogating the Claimant, noting that they are experienced HR professionals and know how to deal with sensitive situations so would not have done so. ES said she was not there for the start of the meeting; she only returned to the HR office and became involved in the meeting part way through it.
46. JCO said the request for an explanation of the Claimant’s whereabouts on four specific days in February 2020 was made on a post-it note in a casual manner and the Claimant agreed to go away and provide explanations, which she did later that day. The Claimant asserts that HR was unjustifiably questioning her professional integrity. The Respondent denies this and asserts that HR was simply asking the Claimant about her whereabouts and timekeeping, as was their right, and they had a good reason for doing so.
47. On 19 February 2020, the Claimant attended a follow up early morning dentist appointment and again arrived late into the office, at around 10:45. After arriving into the office she made a request to HR regarding attending a funeral the following week. She then left the office for a meeting at lunchtime and while she was out she received emails from both her secretary and from JCO asking the Claimant to call JCO regarding her request to attend the funeral. The Claimant felt that these emails were a continuation of the treatment that she had been experiencing and that her professional integrity was further being called into question. JCO asserted she merely wanted to speak to the Claimant to ask her to pass on her condolences as she knew the deceased. Impact upon the Claimant
48. The Claimant said that she felt bullied. She said some of the Incidents may sound trivial in isolation, but when she was treated by JC and the clique in the way that she was, day in, day out, over a long period of time, she found it very difficult to deal with.

49. The Respondent gave evidence to say that JC arranged for a collection for the Claimant's 40th birthday and that this was not indicative of someone being a bully. The Claimant said her birthday was acknowledged a week late at the office when her secretary gave her a card and the collection. She said this was the case despite people knowing it was her birthday the week before and the fact that other members of VLD's significant birthdays and events usually involved much more celebration at the office.
50. In November 2020, after FL qualified as an Advocate and invited everyone in the office to go for a drink to celebrate, the Claimant replied in a friendly manner saying she would be delighted to join FL for a drink [372a and b]. She also congratulated FL when she heard she had qualified. In addition, the Claimant asked to be put on the VLD table at the Christmas party in 2019. The Respondent's representative asked the Claimant why she did these things if she was so troubled by the way in which she was being treated by members of VLD. The Claimant explained that she thought that if she was friendly and attended social events, members of the clique might be friendlier and more willing to assist her.
51. When talking about the Last Straw the Claimant said she felt incredibly disappointed. She had done nothing wrong, she was proud of her work and passionate about her role. She felt her professional integrity was being questioned and she knew she was being lied to. To be questioned not just by her colleagues but now also by HR was "gutting". She felt the way in which she had been treated was unprofessional and she was very embarrassed. She said that HR were perfectly entitled to ask her about her timekeeping, but the way in which they did so made her position at the Respondent untenable. She was physically and mentally exhausted and could not continue to work like that.
52. The Respondent's representative asked the Claimant why she did not resign immediately after the Last Straw. The Claimant explained that she had been signed off work by her doctor on 20 February 2020 with work related stress because of what had happened, but she was frightened of the consequences of not going back to work; she had a mortgage to pay. She said she was usually a happy, healthy person, having only taken sick leave from the Respondent once before (just prior to the mediation and also due to work related stress). However, at this time she said she was very anxious and her health was suffering terribly. She said she was put on medication when she went on sick leave but when she stopped taking the medication she knew she had no choice but to resign, so she did so on 20 March 2020. Tribunal's Findings
53. The test for constructive dismissal is well established and is set out in the case of *Radcliffe v States Employment Board* [2019] TRE 204 at paragraphs 68 to 82. In addition, the Tribunal had regard to the case of *Gogay v Herefordshire County Council* [2001] IRLR 703 CA, where the English Court of Appeal stated that the test is a "severe" one and constructive dismissal is not to be found unless the level of severity is proved.

54. The First consideration the Tribunal must make when determining whether the test for constructive dismissal is satisfied is whether there was a repudiatory breach of contract. More specifically, based on the facts of this case, the question is, was the Respondent in breach of the term of trust and confidence implied into the contract of employment between the parties? In order to answer this, the Tribunal first considered each of the Incidents independently. Timekeeping Comments
55. In relation to the comments made by JC and FL regarding the Claimant's timekeeping and whereabouts, having assessed the evidence given by the Claimant, JC and FL and their manner at the Hearing, and having considered each comment separately, the Tribunal concludes that, on a balance of probabilities, it is more likely than not that these comments impacted negatively upon the Claimant and that they were made in ways which were designed to do so. The Tribunal further finds that none of these comments were necessary.
56. The Claimant also asserts that JC sought to monitor her timekeeping and whereabouts. The Tribunal does not consider that there is sufficient evidence to prove this assertion. Reporting the Claimant
57. The Tribunal has concluded that there was no justification for the first complaint made in 2017 regarding the Claimant's legal aid client. However, due to the date on which it was made and the fact that it did not relate to the Claimant's timekeeping or whereabouts, the Tribunal considers it to be of little relevance.
58. The second complaint made in 2017, regarding the Claimant's absence on Battle of Britain day, appears to have, at least to some extent, been justified and it was a relatively minor complaint. Accordingly, and again based on the passage of time since it was made, the Tribunal has had little regard to this.
59. The complaints made in 2019 and 2020 regarding the Claimant's timekeeping, on the other hand, were relevant and more significant. Any reports JC or FL made in relation to the Claimant's timekeeping could not have been fully justified as they did not always know where the Claimant was when she was absent from the office or whether the Claimant worked at times outside of her contracted hours, in the evenings or at the weekends. FL admitted that she did nothing to substantiate the complaints she made. In addition, FL made her complaint to HR after she had previously made it to DF and DF had told her it was not her concern. The Tribunal finds that these reports were made without proper justification or consideration and, at best, with a disregard for the impact such reports could have on the Claimant. Exclusion from "the Clique"
60. The Claimant has asserted that there was a clique within VLD that made her feel excluded. She refers to the general attitude of JC, FL's refusal to assist the Claimant and specific seating arrangements in support of her assertion that she was excluded from this clique.

61. The Respondent has admitted that JC, FL, the other VLD full time fee earner and secretaries all got along well together and, whether or not they are labeled as a “clique”, the Tribunal is in no doubt that they were a close group of colleagues and many of them were good friends. This is not a criticism; indeed it is beneficial for colleagues get along well together.
62. However, if the Claimant was not part of this group it is understandable that she may have felt excluded. That said, the fact that someone feels excluded because they do not get along with their colleagues as well as others, would not be sufficient to seriously damage the trust between the employer and employee. The position may be different if someone is able to show that they were actively excluded at work and, after the employer becoming aware of this, no attempts were made to remedy the situation, but the Tribunal is of the view that the Claimant has not satisfied the burden of proof in this regard.
63. JC denies that she looked at the Claimant in an aggressive way and that she failed to greet the Claimant in the mornings. JC also asserts that, if she only provided one copy of a document when she was asked for two, this was done in error. The Tribunal is not convinced that only one copy of the document was provided on purpose nor that JC’s general attitude towards the Claimant was aggressive. However, based on its assessment of both the Claimant and JC at the Hearing, the Tribunal finds that it is more likely than not that JC’s attitude in general towards the Claimant was less friendly than it was to other colleagues. While this could have led to a feeling of exclusion, again, this would not be sufficient on its own to seriously damage the trust between the parties.
64. Turning to the evidence in relation to FL refusing to assist the Claimant with her work, this is disputed and the Claimant has not done enough to prove that FL refused to assist her unjustifiably. Even if FL did refuse to assist the Claimant, the Tribunal is not satisfied that any such refusal would have had the purpose or effect of excluding the Claimant.
65. With regard to the seating arrangements, it is unfortunate that JCO was unable to explain the reasoning behind the desk moves in August 2019 to the Claimant when she asked, but JCO did assure the Claimant that it was JCO’s decision and not FL’s. The Tribunal is of the view that, based on the information provided to it, there was little more the Respondent could have done to allay any feelings of exclusion suffered by the Claimant as a result of her desk being moved.
66. When considering the Respondent’s reasons for the Claimant being seated on a different table to her litigation colleagues at the 2016 and 2017 Christmas parties, the Tribunal did not find these to be compelling and has sympathy for the Claimant’s assertion that these seating arrangements made her feel excluded. That said, the Tribunal notes that the Christmas parties in question occurred over 2 years prior to the Last Straw and, at her request, the Claimant was seated with her colleagues at the most recent Christmas Party. Inaction by the Respondent 67. The Claimant mentioned the issues she was having with JC on a number of occasions to DF and HR before making a formal complaint against JC in March 2018. The Respondent dealt with these complaints by suggesting mediation between the Claimant and

JC, which the Respondent understood successfully resolved the issues when JC and the Claimant reached a mediation agreement in May 2018. 68. The only specific complaint that the Claimant has referred to after May 2018 was in September 2019, when she reported the issues she had been experiencing with FL to JCO. 69. The Claimant has criticised the Respondent for not doing more to resolve the issues that she was experiencing. In particular, the Claimant alleges that someone should have followed up with her and JC after the mediation. The Tribunal finds that, while mediation is a confidential process, the Respondent could nevertheless have checked with the Claimant and JC periodically after the mediation as to whether or not the situation remained resolved and that no further issues had arisen. 70. In addition, the Tribunal notes that VLD appeared to take a more passive approach to the way in which it monitored its staff, not actively scheduling appraisals but having an open door policy with a view to allowing employees to raise issues as they arose. The Tribunal is of the view that while this may work very well with some employees, for others, it may mean they are less inclined to raise issues without an allotted time or forum in which to do so. That said this approach would in no way amount to a breach of trust and would not have prohibited the Claimant from raising any issues that she had. 71. The Claimant could have raised, either with JC or with the Respondent, at the time when she alleges JC breached the mediation agreement, that the Claimant believed JC had done so. As the Claimant did not raise this nor did she make any complaints after March 2018 to the partners or anyone else other than one complaint to JCO in September 2019, the Tribunal is not compelled by the Claimant's criticism of the Respondent for not doing more to seek to resolve the issues she was experiencing. Mediation 72. As part of this dispute, the Claimant has raised Incidents that were the subject of the mediation agreement between the Claimant and JC. If JC were the Respondent in this matter then she may be able to rely on the mediation agreement to draw a line underneath anything that happened before, but the Respondent was not a party to the mediation agreement. It is, therefore, not clear on what basis the Respondent is entitled to rely on it. Accordingly, the Tribunal has not discounted the Incidents that occurred prior to the mediation agreement. However, it has viewed them in the context of the dates on which they occurred and the fact that they were subject to a mediation agreement between the Claimant and JC. The Tribunal also notes that the Claimant asserts JC breached that agreement. The Last Straw 73. The Claimant asserts that the context surrounding the meeting that she attended with HR on 17 February 2020 (the "Spot Check Meeting") is important. The Claimant does not dispute that HR had the right to ask her questions in relation to her timekeeping and whereabouts, but asserts that the manner in which they did so constituted a breach of the term of trust and confidence. 74. The Claimant asserts that she was "ambushed" by HR and "subjected to interrogation" on her timekeeping and that "the tone of the interrogation was extremely threatening" [82]. The Claimant was asked to attend HR without warning and then asked questions about her timekeeping and the Tribunal accepts that the Claimant may well have been shocked and upset by this. However, having heard the witness evidence of the Claimant, ES and JCO and had the opportunity to assess their manner at the Hearing, the Tribunal is not compelled by any assertion that the meeting was "extremely threatening". 75. The Tribunal has, however,

made several other findings in relation to the way in which the Spot Check Meeting was conducted. These are set out below: (1) It is understandable that JCO did not want to raise the issues she wished to discuss with Claimant over email, but she could have asked the Claimant to attend the HR office by email and given her some warning of the meeting, rather than asking the Claimant to follow JCO to the HR office in sight of the Claimant's colleagues. (2) The only substantiation given for questioning the Claimant, over and above the complaints made by FL and the other fee earner, was that HR identified "discrepancies" when looking at the Key Fob Records. It is presumed these discrepancies were between the Key Fob Records and the Claimant's contracted hours. This is very poor substantiation. There are likely to be many such discrepancies for any number of valid reasons, for example, if the Claimant was at court or if she followed someone through the door rather than using her key fob to access the office. In addition, there were other documents HR could have looked at before questioning the Claimant; for example, it is likely her time recording would have shown if she was at court on a particular day. (3) The Respondent gave conflicting evidence as to the formality of the meeting. While ES asserted it was an informal chat to establish whether an investigation should be undertaken, JCO said a formal complaint relating to the Claimant's timekeeping had been made, which would be investigated. The Respondent's handbook makes it clear that poor timekeeping is an act of misconduct, which may result in disciplinary action being taken [330], but the Claimant's evidence did not indicate that she thought a formal disciplinary process had been commenced. (4) JCO made up a reason as to why she was questioning the Claimant and further denied the real reason when the Claimant put it to her. JCO states that the reasons for doing this were well intentioned and, indeed there are no allegations of any malice. The Tribunal has sympathy for the reasons as to why JCO withheld the truth and there may be some instances that justify withholding certain facts (for example to protect confidentiality where necessary or where providing information may compromise an investigation) but such instances are not argued in this case. In addition, the Claimant would not have been aware of these reasons at the time. The Respondent indicates the importance it places on honesty as it states in its handbook that it "expects its employees to act with the highest standards of honesty and integrity" [347]. (5) JCO admitted that the way the Spot Check Meeting was dealt with may have been wrong and ES said that, with hindsight, this situation should have been dealt with differently. (6) DF indicated at the Hearing that if the Claimant were to have any issues at work which were not work related, it was HR to whom these should have been referred. The relationship of trust and confidence between the Claimant and HR is therefore of particular importance.

76. It is not in dispute that an employer is entitled to ask questions about its employees' whereabouts and undertake investigations to confirm them, and doing so would certainly not constitute any breach of contract. However, when doing so, the employer should take time to consider the best way to do this without causing embarrassment or creating animosity. Indeed, extra care should be taken if the employer is of the view that the best way in which to deal with the situation is by telling a lie, even if it is a white lie.

77. While JCO intended to diffuse the situation by withholding the truth, her actions had the opposite effect and she created further animosity, this time between the Claimant and HR. From the Claimant's perspective she was being lied to by people in a trusted position whilst they were questioning her about something that could result in disciplinary action and that they were doing so on the basis of complaints that had been made by an individual who she correctly asserts did not like her.
78. In addition, there were other things HR could have done to minimise the impact on the Claimant. They could have looked at other documents to see if there was any validity to the complaints before raising them with the Claimant, they could have given the Claimant warning of the meeting and been more discreet by asking her to attend by email rather than in front of her colleagues.
79. The Tribunal concludes that the Spot Check Meeting had a significant impact upon the Claimant. While there may have been no intention for the meeting to have such an impact, the Tribunal is of the view that more careful consideration should have been given to the way in which the meeting was conducted. Vicarious Liability 80. The Claimant is asserting that the Respondent is vicariously liable for the actions of its employees in relation to the Incidents. The Respondent does not appear to accept this. The Respondent's representative made a reference in his written submissions to the Supreme Court case of *WM Morrison Supermarkets v Various Claimants* [2020] UKSC 12, which discusses the tests as to whether or not the employer is liable for the acts of its employees under common law [11]. The Respondent's representative also noted in his oral submissions that JC was not employed to monitor the Claimant. The Claimant's representative submitted that the Respondent could not hide behind the veil of a partnership and any submission that the Respondent was not vicariously liable for the actions of its employees is self-evidently flawed. 81. The Tribunal considered the law on vicarious liability as discussed in *VW Morrison Supermarkets* and in particular had regard to the general principle applicable to vicarious liability arising out of a relationship of employment, which was identified by Lord Nicholls in *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48: "the wrongful conduct must be so closely connected with the acts the employee was authorised to do that, for the purposes of the liability of the employer to third parties, it may fairly and properly be regarded as done by the employee while acting in the ordinary course of his employment". (see *VW Morrison Supermarkets* paragraph 23 and 32). The Supreme Court also made it clear that, when applying this general principle, it is necessary to have regard to the assistance provided by previous court decisions (see paragraph 36). The judgment went on to refer to several past decisions and concludes the point by saying that those past decisions illustrate the distinction drawn by Lord Nicholls in *Dubai Aluminium* between "cases ... where the employee was engaged, however misguided, in furthering his employer's business, and cases where the employee is engaged solely in pursuing his own interests: on a 'frolic of his own'" (see paragraph 47). 82. The Tribunal is of the view that the relevant acts of HR were very closely connected with acts they were authorised to do and were clearly done in the course of their employment. 83. In addition, both JC and FL gave evidence to say that they made reports about the Claimant

and commented upon her timekeeping not for personal reasons, but for the benefit of the Respondent. The Respondent did not appear to assert that JC and FL were off on a ‘frolic of their own’ and neither did the Tribunal find that they were. Further, it would necessarily be in the ordinary course of the employment of FL and JC to make comments to their colleagues and to report information to HR, indeed, some of the relevant reports were made at the request of the Respondent as part of a staff survey. The fact that the particular comments and reports they made were misguided is not relevant. It is evident from past case law that a distinction can be drawn between what an employee is specifically employed to do and the things that they do while acting in the ordinary course of their employment. In this case, while neither JC nor FL were specifically employed to comment or report upon the Claimant’s timekeeping, this would not prevent them from doing so in the ordinary course of their employment. 84. Accordingly, the Tribunal finds that the relevant acts of HR, JC and FL were done in the ordinary course of their employment and the Respondent should be held vicariously liable for those actions.

85. That said, it is still necessary to consider what the Respondent knew, or ought to have known, about these actions and what it did in response to any such knowledge. The Claimant recognised this to be a relevant consideration as she criticised the Respondent for not doing more. However, as discussed above, the Respondent’s knowledge of the issues the Claimant was experiencing was very limited and, while it could have done more to find out, the Claimant could also have done more to notify it and the fact that the Respondent did not do more would not be considered to be a repudiatory breach. Course of Conduct
86. Having considered each of the Incidents in turn, the Tribunal then went on to consider the Incidents together as a course of conduct.
87. The Respondent’s representative asserted that the Claimant’s case is “concocted” and she has a “fertile imagination”. While the Tribunal accepts that the Claimant may have perceived some of the Incidents in a way in which they were not intended, the Tribunal does not find that the Claimant’s case is concocted or imagined. The Tribunal considered the Claimant to be a very open and honest witness.
88. However, it is up to the Claimant to demonstrate, on a balance of probabilities, that all of the Incidents occurred. While the Tribunal has found that some of the Incident are not sufficiently proven, it has also found that the timekeeping comments, the more recent reports made about the Claimant’s timekeeping and the Last Straw were either admitted or proven. It is these proven Incidents that the Tribunal considered when determining whether there was a course of conduct that constituted a breach of the implied term of trust and confidence. In addition, the Tribunal has kept in mind the fact that the Incidents occurred against a background of the sense of exclusion the Claimant felt as a result of some of the Incidents.
89. Following the judgment of the Tribunal in *Maclagan v States Employment Board*

- [2015] TRE 079 at paragraph 107: “the test in such situations is whether, viewed objectively, (i.e. from the perspective of a reasonable person in the position of the innocent party) there was some act or omission (or series of acts or omissions) which was “likely to destroy or seriously damage the relationship of confidence and trust between employer and employee... so that the relationship is fundamentally damaged and not able to continue as before.” As outlined above, the Tribunal is not required to make a factual finding upon the Respondent's actual intent”. [emphasis added]
90. The Royal Court also commented on the requirements for a breach of the implied term when it said in *Alwitry v States Employment Board* [2019] JRC 014 “... in every contract of employment there is an implied term of mutual trust and confidence, the loss of which would go to the root of the contract. As Lord Nicholls said in *Malek v Bangor Credit and Commerce International (A)* [1998] AC 20 at page 13, there is a general obligation not to engage in conduct likely to undermine the trust and confidence required if the employment relationship is to continue in a manner the employment contract implicitly envisages. He made clear that the conduct must be looked at objectively in all of the circumstances.” [emphasis added]
91. The Tribunal is mindful that a high bar is set for it to be satisfied that there was conduct by the Respondent that entitled the Claimant to resign; the test is a severe one. The Tribunal does not believe that any of the Incidents alone were sufficient to destroy or seriously damage the trust between the parties. It has therefore given very careful consideration as to whether, when all of the relevant, proven Incidents are considered together, they form a course of conduct that reaches the high bar set to pass the test. This was a difficult decision to make and the Tribunal has not come to it lightly.
92. The Tribunal has found that the Claimant was asked, without warning and in view of her colleagues, to meet with HR and was then questioned about her timekeeping and whereabouts by people in a trusted position who then lied to her when she asked why. This occurred against a background of unnecessary comments being made to the Claimant about her timekeeping, which were designed to have a negative impact upon her, and poorly considered and unjustified reports being made about her timekeeping with no regard for the impact that may have upon her. However, the Tribunal also notes that the Claimant did very little to seek to improve her position, or to bring the issues she was experiencing to the attention of the people she worked for.
93. The Tribunal is satisfied that the acts together would damage the relationship of trust between the Claimant and her colleagues. However, in order for there to be a breach of the implied term the damage to the relationship of trust between the Claimant and the Respondent must be so serious “that the relationship is fundamentally damaged and not able to continue as before”. In addition the Tribunal must determine this issue not based on whether the Claimant’s trust in the Respondent was destroyed, but by looking objectively at whether the trust between the Respondent and a reasonable person in the same position and circumstances as the Claimant would have been destroyed or seriously damaged. The

Tribunal also notes that the intention of the Respondent is not a relevant consideration.

94. When applying the test above to the findings made in this case, it is the decision of the Tribunal that the Respondent's course of conduct was not sufficiently serious to amount to a repudiatory breach of contract, which is required in order to entitle the Claimant to resign and claim she has been constructively dismissed.

Conclusion

95. As no repudiatory breach of contract has been found, it is not necessary to consider the remaining limbs of the test and the claim for constructive unfair dismissal fails. As there was found to be no dismissal the claim for wrongful dismissal also fails.
96. Finally, the Tribunal wishes to make it clear that, when coming to its decision, it had no regard to the material that the Respondent put forward in respect of the alleged issues with the Claimant's time keeping and whereabouts. The material was, at best, inconclusive. DF admitted that some of it had been taken at face value and presented to the Tribunal without any interrogation. A full picture had not been put forward and the information appeared to have been 'cherry picked'. Despite the significant amount of time spent discussing the Claimant's timekeeping at the Hearing, the Tribunal is in no way persuaded that there were any issues with it, not least because during the Claimant's employment with the Respondent she never received a complaint from any of the people she worked for regarding her time keeping, the hours that she worked or the amount of work that she did. The Claimant asserts that the Respondent's reason for raising allegations against her in the context of this claim was to pressure her into dropping the claim. The Tribunal makes no finding on this either way but in general notes that it takes a very dim view of such an approach. Summary of Award
97. The Claimant is awarded £1,872 in respect of holiday pay. Mrs H Westmacott, Deputy Chairman Sent to the parties on: 30 March 2021

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.jerseylaw.je/judgments/tribunal/Pages/%5B2020%5DTRE069.aspx>

CASE PAGE <https://chat.esheria.ai/case-law/jersey/estelle-burns-v-voisin-law-2021>

Prepared on 22 October 2026 · Esheria